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**IN THE SUPREME COURT OF PENNSYLVANIA**

CAROL ANN CARTER; MONICA PARRILLA;  
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.

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 MCMAHON; TIMOTHY G.  
FEEMAN; and GARTH ISAAK,

Petitioners,

v.

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

Respondents.

No. 7 MM 2022

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**CARTER PETITIONERS' BRIEF IN SUPPORT OF  
EXCEPTIONS TO THE SPECIAL MASTER'S REPORT**



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Pursuant to this Court's February 2, 2022 Order, the *Carter* Petitioners respectfully submit the following Brief in Support of Exceptions to the Commonwealth Court's Special Master's Report and urge this Court to adopt the Carter Plan as the Commonwealth's next congressional map.

## **I. INTRODUCTION**

Four years ago, in *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018) ("*LWV II*"), this Court invalidated the state's 2011 congressional map as an unconstitutional partisan gerrymander and subsequently adopted a remedial congressional map that reflected the physical and political geography of the Commonwealth (the "2018 Remedial Plan"). In its accompanying opinion, this Court articulated the following redistricting principles to protect against partisan vote dilution: congressional districts should be compact, contiguous, equal in population, and maintain the integrity of political subdivisions. Of all the plans before the Court at the time, the 2018 Remedial Plan best reflected these criteria.

Now, in 2021, the Carter Plan is the map before this Court that best reflects these criteria and the underlying principle of equal representation they seek to protect. The Carter Plan not only performs as well or better on all traditional and historical redistricting standards than the other submissions before this Court (the "Submitted Plans"), it is also undisputedly the map that hews closest to this Court's



2018 Remedial Plan, preserving the cores and lines of current districts to the greatest extent possible, while accounting for changes in the Commonwealth's population over the past decade. In fact, the Carter Plan *improves* upon the 2018 Remedial Plan's compliance with the traditional redistricting criteria articulated in *League of Women Voters*, as well as upon historical considerations like preserving communities of interest. None of the other Submitted Plans has fewer county splits, and only one plan splits fewer precincts. And, in adhering to these criteria, the Carter Plan is unsurpassed on partisan fairness.

The Carter Plan effectively guarantees the Commonwealth's constitutional promise to Pennsylvania's citizens that elections will be free and fair and that no votes will be diluted. This Court underscored in 2018 that the "overarching objective" of the Pennsylvania Constitution's Free and Equal Elections Clause "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." *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018) ("*LWV I*"). Accordingly, this Court viewed the neutral redistricting criteria as a "floor" to protect against vote dilution, *id.*, using them not as ends unto themselves but as tools to measure what really mattered—whether a congressional map unfairly dilutes votes. *Id.* at 816. The Carter Plan stands out for embodying equal participation through partisan fairness. It performs exceptionally



well on the fairness metrics considered by experts in this case, yet was not drawn with a partisan outcome in mind. The Carter Plan is the *only* plan whose map-drawer himself testified to the process and goals, and Dr. Rodden's unrebutted testimony demonstrates that he drew the Carter Plan without partisan intent.

In sum, the Carter Plan meets or surpasses the performance of the 2018 Remedial Plan as well as the other Submitted Plans on traditional redistricting criteria, is superior or comparable to other plans on historical criteria, best reflects the political preferences of Pennsylvania voters, and best preserves the features of the districts in the 2018 Remedial Plan that this Court chose just four years ago. In contrast, HB 2146, the plan recommended by the Special Master, falls well below the Carter Plan on traditional and historical redistricting criteria and fares particularly poorly on partisan fairness measures, which reveal it to be among the most biased of the plans—and thus among the most likely to dilute votes in contravention of the constitutional command of equal representation. To ensure that command is fulfilled, the Court should adopt the Carter Plan in full.

## **II. CREATING THE CARTER PLAN**

### **A. This Court's 2018 Remedial Plan is a logical and compelling starting point.**

As this Court knows well, Pennsylvania's current congressional redistricting map is the culmination of months-long litigation, a record developed in the Commonwealth Court, and myriads of map submissions from parties, intervenors,



and *amici*. See *LWV II*, 181 A.3d at 1086–87. After invalidating the 2011 plan as a partisan gerrymander, this Court drew and adopted the 2018 Remedial Plan because it was “superior or comparable” on every standard that the Court considered. *Id.* at 1087.

Those standards, which this Court and the federal courts have developed over decades, fit into two principal categories. First, there are several “neutral criteria” (referred to herein as “traditional criteria”) used as the primary means to assess congressional redistricting plans: (1) population equality; (2) compactness; (3) contiguity; and (4) respect for political subdivisions. *Id.*; *LWV I*, 178 A.3d at 816–17. Second, if a plan complies with these four neutral principles, the court should look to so called “historical criteria,” *i.e.*, “other factors [that] have historically played a role in the drawing of legislative districts, such as the preservation of prior district lines, protection of incumbents, or the maintenance of the political balance which existed after the prior reapportionment.” *LWV I*, 178 A.3d at 817; *see also Mellow v. Mitchell*, 607 A.2d 204, 206 (Pa. 1992) (listing “effectuating adequate representation of a minority group,” “maintaining relationships of shared community interests,” and “not unduly departing from the useful familiarity of existing districts” as “advanc[ing] the cause of equality” in congressional redistricting); *id.* at 207 (including “avoiding contests between incumbent Representatives” as a “legitimate state objective” in congressional redistricting



(quoting *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)); *id.* at 210 (considering whether a congressional plan was “politically fair”).

These standards enable courts to assess the fundamental underlying principle—whether a plan upholds the guarantee of “free and equal” elections promised by the state’s constitution by not diluting the power of any Pennsylvanians’ votes. *LWV I*, 178 A.3d at 816. The objective is “representational districts that both maintain the geographical and social cohesion of the communities in which people live and conduct the majority of their day-to-day affairs, and accord equal weight to the votes of residents in each of the various districts.” *Id.* at 814, 816.

The 2018 Remedial Plan has proven especially successful in meeting these goals. In Pennsylvania’s 2018 and 2020 elections, the current map produced a congressional delegation that mirrors the partisan preferences of Pennsylvania’s voters. Rodden Initial Rep. at 25 (Jan. 24, 2022). These elections also demonstrated that the current map allows for relatively competitive elections that respond to changes in Pennsylvania voters’ preferences. *Id.* at 6. In sum, the 2018 Remedial Plan reflects a careful balancing of historical and traditional redistricting factors and provides the most recent guidance both on the drawing of a proposed congressional plan and the criteria by which it should be evaluated.



**B. The Carter Plan was drawn to build upon the 2018 Remedial Plan’s “superior” adherence to both traditional and historical redistricting criteria.**

The Carter Plan was drawn by Dr. Jonathan Rodden, a professor of political science at Stanford University, who has published extensively on political representation, geographic location of demographic and partisan groups, and the drawing of electoral districts. *Id.* at 1–2. Dr. Rodden has been accepted and testified as an expert witness in six election law and redistricting cases, including most recently in two redistricting cases in Ohio in January 2022, in which the Ohio Supreme Court credited his maps and analysis. *Id.* at 2.

Dr. Rodden’s map-drawing process began with the 2018 Remedial Plan, which is widely acknowledged as a successful plan on both traditional redistricting criteria and partisan fairness. N.T. at 87–89, 247–48. His primary considerations in drawing the Carter Plan were to adhere to the traditional redistricting criteria while accounting for Pennsylvania’s population changes since 2010. Rodden Initial Rep. at 1 (Jan. 24, 2022). 2020 Census data show that, due to its relatively slow population growth compared to the nation, Pennsylvania is now entitled to one fewer congressional seat. And population changes within the Commonwealth have been asymmetric: while metropolitan and relatively densely populated areas of the state, like southeastern Pennsylvania and Allegheny County, gained population and grew denser, rural and relatively sparsely populated areas of the state generally lost



population. *Id.* at 6–7. As a result, major reconfigurations of existing districts are unavoidable in rural Pennsylvania, whereas metropolitan districts required only fine-tuning based on localized variations in the rate of population growth. *Id.* at 8–9.

When drawing the Carter Plan, Dr. Rodden did not consider partisan or racial data. N.T. at 117–18; Rodden Initial Rep. at 23 (Jan. 24, 2022). Rather, he made adjustments to the 2018 Remedial Plan with the goal of maintaining and improving its adherence to traditional and historical redistricting criteria. For example, Dr. Rodden avoided splitting communities of interest and, where possible, reunited communities of interest that were previously split in the 2018 Remedial Plan, such as in Carbon County. *See* N.T. at 107, 111, 113–14.

Dr. Rodden took a least-change approach because the 2018 Remedial Plan is a constitutional, fair map that this Court has determined reflected both redistricting standards and the underlying principle of equal representation. *See* N.T. at 89. Contrary to the Special Master’s characterization, the Carter Plan does not “elevate a subordinate factor into a dominant one” by using the least-change approach. Rep. at 187 (FF10). Rather, Dr. Rodden drew the map to comply—and it does comply—with all traditional redistricting criteria, none of which were “subordinate[d]” to another criterion. In these circumstances, a least-change approach was an effective means to meet the dominant traditional and historical redistricting principles that the 2018 Remedial Plan embodies. And such an approach has the added benefit of



ensuring continuity for voters, N.T. at 410–11, which is one of the reasons why this Court recognized preserving district lines as a valid redistricting criterion. *LWV I*, 178 A.3d at 816–17.

Notably, Dr. Rodden was the only map-drawer to testify. As a result, unlike every other plan, the Carter Plan’s process of creation can be accurately assessed as to underlying motivations and rationale. That the Carter Plan—alone among the Submitted Plans—has transparency about its provenance should be lauded, not criticized as the Special Master did, and this fact only bolsters its credibility for adoption by this Court.

### **III. REDISTRICTING PRINCIPLES**

#### **A. The Carter Plan complies with all four traditional redistricting criteria.**

The Carter Plan complies with the four traditional principles of redistricting identified by this Court in *League of Women Voters*, including (1) population equality, (2) compactness, (3) contiguity, and (4) integrity of political subdivisions. *See LWV II*, 181 A.3d at 1087. Notably, the Carter Plan performs among the best of the Submitted Plans across all four criteria.

##### **1. The Carter Plan has equal population.**

The Carter Plan complies with the *League of Women Voters* principle of population equality. A congressional redistricting plan “should consist of: congressional districts . . . as nearly equal in population as practicable.” *Id.* at 1085.



Under the “one person, one vote” principle, congressional districts within a state must have equally apportioned numbers of persons. *See Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). For federal congressional districts, “extremely small deviations in district populations may be justified by, inter alia, a desire to avoid splitting of political subdivisions and precincts, to provide adequate representation to a minority group, and/or to preserve communities of interest.” *Mellow*, 607 A.2d at 208.

Based on the 2020 Census, the ideal population of each congressional district is 764,865. Rodden Initial Rep. at 21 (Jan. 24, 2022). Each of the proposed maps, including the Carter Plan, creates 17 districts in which the population, based on 2020 Census data, is either precisely that number, one more, or one fewer. Rodden Rebuttal Rep. at 2 (Jan. 26, 2022). The Carter Plan includes four districts with the ideal population and 13 districts with a deviation of plus or minus one person. Rodden Initial Rep. at 21 (Jan. 24, 2022).

The Special Master wrongly gave less weight to the Carter Plan based on its maximum two-person population deviation. *See Rep.* at 139 (FF3). The Special Master cites no authority supporting her decision, and population deviations of plus or minus one person have long been considered to satisfy the population equality standard. *See Mellow*, 607 A.2d at 208 (adopting plan that had a total maximum deviation of “0.0111%”); *Kalson v. Paterson*, 542 F.3d 281, 285 n.6 (2d Cir. 2008) (stating that New York’s congressional districts “each . . . had the same total



population of 654,360” with “deviations [of] plus or minus one person”); *Essex v. Kobach*, 874 F. Supp. 2d 1069, 1088 (D. Kan. 2012) (“The Court’s plan results in two districts with populations of 713,278 and two with populations of 713,281. Such a distribution provides equality among Kansas voters as nearly as practicable, and therefore satisfies Article I, Section 2 of the U.S. Constitution.”); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) (“In keeping with our overriding concern, the court plan complies with the ‘as nearly as practicable’ population equality requirement of Article 1, § 2 of the Constitution . . . with a deviation of plus or minus one person.” (citing *Karcher*, 462 U.S. at 730)).

This Court itself has previously adopted a map with a much greater deviation than two persons, selecting that plan over others, including a map with zero deviation. *See Mellow*, 607 A.2d at 208. This illustrates the Special Master’s error in giving less weight to the Carter Plan.

Indeed, congressional maps with population deviations of two or more persons are commonplace across the country. *See, e.g.*, Oregon (two-person population range after 2010 redistricting cycle);<sup>1</sup> Georgia (two-person population

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<sup>1</sup> *See* “2010 Redistricting Deviation Table,” Nat’l Conf. State Legislatures (Jan. 15, 2020), <https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx>.



range after 2010 redistricting cycle);<sup>2</sup> Colorado (two-person population range in court-enacted plan after 2000 redistricting cycle);<sup>3</sup> Maryland (two-person population range after 2000 redistricting cycle).<sup>4</sup> And counsel is not aware of a single case striking down a congressional map based on a two-person deviation. Thus, precedent and historical practice roundly undermine the Special Master’s decision to assign less weight to the Carter Plan because of its population deviation.

To summarize, the Carter Plan has a minimal population deviation that has never been found to violate the equal population principle and, in fact, complies with the standard that has been articulated by multiple courts. It thus satisfies the constitutional requirement of population equality, and the maximum two-person deviation is no basis for giving it less weight.<sup>5</sup>

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<sup>2</sup> See *id.*; see also “Justice Approves Georgia’s Redistricting Plans,” Ga. Dep’t of Law (Dec. 23, 2011), <https://law.georgia.gov/press-releases/2011-12-23/justice-approves-georgias-redistricting-plans> (announcing preclearance by U.S. Department of Justice).

<sup>3</sup> See “Designing P.S. 94-171 Redistricting Data for the Year 2010 Census,” U.S. Census Bureau (Sept. 2004), [https://www2.census.gov/programs-surveys/rdo/2010\\_pl94-171rv.pdf](https://www2.census.gov/programs-surveys/rdo/2010_pl94-171rv.pdf), at 26; *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002) (adopting plan).

<sup>4</sup> See U.S. Census Bureau, *supra* note 3; *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543 (D. Md. 2002) (rejecting challenge to plan that did not allege unconstitutional population deviation), *aff’d* 332 F.3d 769 (4th Cir. 2003).

<sup>5</sup> Nevertheless, Dr. Rodden drew a very slightly revised map, which includes twelve districts with the ideal population and five districts with one fewer person than the ideal. See Exhibit A. The only changes he made were to further equalize population, which resulted in an additional split of a Vote Tabulation District (“VTD”) but did not otherwise impact any of the plan-wide metrics that Dr. Rodden reported. *Id.*



## 2. The Carter Plan is compact.

The Carter Plan complies with the *League of Women Voters* principle of compactness. A congressional redistricting plan “should consist of: congressional districts composed of compact . . . territory.” *LWV II*, 181 A.3d at 1085; *see also Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Brown v. Thomson*, 462 U.S. 835, 842 (1983). However, there is no bright-line test to determine whether a plan is sufficiently compact to satisfy the criterion. *See* N.T. at 404–05. Nor is there a widely accepted “best” measure of compactness, as each measure of this principle achieves something different. Because each method has certain limitations, it is important to consider how maps perform across multiple metrics. Rodden Rebuttal Rep. at 3 (Jan. 26, 2022); N.T. at 214.

To evaluate compactness, this Court has relied on the Reock and Polsby-Popper measures. *See LWV I*, 178 A.3d at 771–72 (calling the Reock and Polsby-

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Avoiding an additional VTD split is precisely the kind of tradeoff that courts, including this Court, have recognized as reason to allow minor population deviations—indeed, much greater deviations than the Carter Plan’s. *Mellow*, 607 A.2d at 208, 218 (holding that a deviation of 0.0111% was “fully justified by the policy of preserving municipalities and precincts” and adopting the Special Master’s conclusion that “a serious election administration problem arises from requiring the voters in a single precinct to look to two different sets of congressional candidates”); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 933 (W.D. Mo. 1982), *aff’d sub nom.*, *Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982) (holding that departures from mathematical perfection are justified by avoiding the splitting of election precincts). However, to the extent this Court agrees with the Special Master’s equal population analysis, the *Carter* Petitioners respectfully request that this Court consider and adopt the Revised Carter Plan set forth in Exhibit A.



Popper metrics “widely-accepted standards”). According to these measures, the Carter Plan closely mirrors or exceeds the respective compactness scores of the 2018 Remedial Plan: it matches the 2018 Remedial Plan’s Reock score, does better than the 2018 Remedial Plan on the Schwartzberg metric, and falls just shy of matching (each by 0.01) the 2018 Remedial Plan’s Population Polygon and Convex Hull scores. Rodden Initial Rep. at 22 tbl. 5 (Jan. 24, 2022).

Moreover, the Carter Plan is similarly compact to the other Submitted Plans. *See* DeFord Rebuttal Rep. ¶ 25 tbl. 8 (Jan. 26, 2022). In particular, the Carter Plan’s Reock compactness score is the second-highest among the Submitted Plans. *Id.* One of the least compact plans is HB 2146, the plan that the Special Master recommended. N.T. at 335.

Compactness scores in particular can be sensitive to individual redistricting choices that account for other traditional criteria. *See* N.T. at 398–99 (Dr. Duchin explaining that complying with traditional redistricting factors is a balancing act). For instance, the Carter Plan’s somewhat lower Polsby-Popper score reflects Dr. Rodden’s decision to keep the city of Pittsburgh whole; splitting Pittsburgh would have improved the plan’s score on that measure, but at the expense of preserving the Commonwealth’s second-largest city. *See* N.T. at 217 (Dr. DeFord explaining that maps that keep Pittsburgh whole obtain lower, though still compliant, Polsby-Popper scores than those maps that split Pittsburgh); Rep. at 148 (FF4). Similarly, some of



the Carter Plan's slightly lower compactness measures result from the effort to maintain population equality in Districts 4 and 5 by accommodating asymmetries in the rate of population growth between Montgomery, Delaware, and Bucks Counties while minimizing county splits in southeastern Pennsylvania. Rodden Initial Rep. at 23 (Jan. 24, 2022).

In sum, the Carter Plan is superior or comparable on the criterion of compactness to both the 2018 Remedial Plan and the other Submitted Plans.

**3. The Carter Plan is contiguous.**

The Carter Plan complies with the *League of Women Voters* principle of contiguity. A congressional redistricting plan “should consist of: congressional districts composed of . . . contiguous territory.” *LWV II*, 181 A.3d at 1085; *see also Miller*, 515 U.S. at 916. Of particular concern are districts that contain shapes or formations, such as “isthmuses” or “tentacles” that destroy or strain the notion of contiguity of a district. *LWV I*, 178 A.3d at 819. The Carter Plan, like each of the other Submitted Plans, is composed of contiguous districts.

**4. The Carter Plan maintains political subdivisions.**

Finally, the Carter Plan also complies with the *League of Women Voters* principle of respect for political subdivisions. A congressional redistricting plan “should consist of: congressional districts . . . which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure



equality of population.” *LWV II*, 181 A.3d at 1085; *see also Karcher*, 462 U.S. at 740–41; *Reynolds v. Sims*, 377 U.S. 533, 580–81 (1964).

The Carter Plan splits fewer political subdivisions than the 2018 Remedial Plan, Rodden Initial Rep. at 21–22 (Jan. 24, 2022), and maintains the integrity of political subdivisions as well as or better than the other Submitted Plans. The Carter Plan is especially effective at maintaining the integrity of counties and Vote Tabulation Districts (“VTDs”), which are equivalent to precincts.

There are two different ways to measure splits of subdivisions such as counties. The first is to measure the *number* of split counties in a plan, which is the number of counties that are not kept whole, regardless of how many times they are split. Rodden Rebuttal Rep. at 3 (Jan. 26, 2022). However, this measure does not capture multiple splits of a single county. For that reason, it is also important to consider the *total* number of county splits in a plan, as that captures more fully the number of *times* counties are split. For example, if a county is split between three districts, the non-contiguous splits of the county are counted as two splits rather than one. *Id.* at 3–4.

Among all the political subdivisions, it is most important to keep counties whole, *see* N.T. at 250–51 (Dr. DeFord explaining that counties are a “more fundamental political unit” than others), and the Carter Plan excels on that metric. The Carter Plan is tied for both fewest *number* of split counties and *total* county



splits among the Submitted Plans. Rodden Rebuttal Rep. at 4 tbl. 2 (Jan. 26, 2022).<sup>6</sup>

The Carter Plan ties with the Reschenthaler Plans for fewest *number* of split counties, 13, but the Reschenthaler Plans each have 18 *total* county splits, one more than the Carter Plan, which has 17. *Id.* at 3–4. The Carter Plan ties with the Citizen Voters Plan and Voters of PA Plan on the *total* county splits, but those plans have a higher *number* of split counties, at 14 and 15 splits respectively. *Id.* Thus, when considering both metrics of county splits, the Carter Plan best maintains the integrity of Pennsylvania counties.

Another type of political subdivision is a VTD—another term for a precinct. For election administration, splitting VTDs can lead to mistakes for local election administrators who must be sure to provide the right ballot for residents living in

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<sup>6</sup> The counting of county splits varies depending on whether a small six-person non-contiguous fragment of Chester County is counted as a “split” if it is placed in a different district than the rest of Chester County. In calculating county splits in the plan it adopted, the *League of Women Voters* Court did not count the separation of that fragment from Chester County because it was more “appropriate[ to] place[ it] inside the district that contains Delaware County.” *LWV II*, 181 A.3d at 1087 n.10. Dr. Rodden maintained that aspect of the 2018 Remedial Plan, such that the Chester County fragment continues to be “appropriately placed” inside District 5 with Delaware County and is kept contiguous with its surrounding area, and to ensure contiguity of the districts. Thus, Dr. Rodden’s tabulation of county splits in his first report reflected that guidance and reported the number of split counties in the Carter Plan as 13. Rodden Initial Rep. at 21 (Jan. 24, 2022). In his response report, Dr. Rodden prepared a comparative table of county splits, but due to the time constraints, he was unable to fully assess all technicalities in each of the 13 other submitted plans, including their treatment of the Chester County fragment, so for illustrative purposes he counted any split, no matter its size and location, including the Chester County fragment. Rodden Rebuttal Rep. at 4 (Jan. 26, 2022).



two different political districts, even though they might be voting at the same polling place. *See Mellow*, 607 A.2d at 218 (Special Master opinion explaining that “a serious election administration problem rises from requiring the voters in a single precinct to look to two different sets of congressional candidates,” and emphasizing that this “problem is not a minor one”). When seeking to establish districts of equal population, VTDs are oftentimes split because they do not add up to precisely the right numbers, especially where map-drawers are working within a very narrow allowable deviation, like plus or minus one person. Rodden Rebuttal Rep. at 6 (Jan. 26, 2022).

Nevertheless, it is possible to minimize these splits, and the Carter Plan splits only 14 VTDs, the second-lowest number among the Submitted Plans. *Id.*<sup>7</sup> In contrast, other plans, such as both Reschenthaler Plans and the Ali Plan, each split twice as many VTDs. *Id.* For these reasons, the Carter Plan is one of the best plans at maintaining political subdivisions.

The Special Master’s analysis of subdivision splits, *see* Rep. at 141–47, ignored that the Carter Plan has the fewest or second-fewest number of both county and VTD splits. That oversight is particularly problematic given that counties are

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<sup>7</sup> Dr. Rodden’s revised plan splits one additional VTD in order to further equalize population. *See supra* note 5; *see also* Ex. A. With 15 VTD splits, the Revised Carter Plan still splits the second lowest number of VTDs among the Submitted Plans. Rodden Rebuttal Rep. at 6 (Jan. 26, 2022).



the most important of the political subdivisions to keep intact, *see* N.T. at 250–51, and this Court adopted the *Mellow* Special Master’s report recognizing that “serious election administration problem[s]” can arise from splitting VTDs. *Mellow*, 607 A.2d at 211; *see also id.* at 218 (Special Master’s Report).

**B. The Carter Plan complies with other historical redistricting factors.**

In addition to the traditional redistricting criteria outlined above, this Court has identified several historical factors relevant for evaluating a redistricting plan, including partisan fairness, preserving prior districts, protection of minority voting rights, respect for communities of interest, and incumbency protection. *LWV I*, 178 A.3d at 817; *Mellow*, 607 A.2d at 208. The Carter Plan performs better than the other Submitted Plans on partisan fairness, is undisputedly superior on maintaining existing districts, and is superior or comparable on the remaining measures.

**1. The Carter Plan best reflects partisan fairness, in compliance with the Free and Fair Elections Clause.**

The Carter Plan best reflects the partisan preferences of Pennsylvania voters. Although partisan fairness has long been a factor in Pennsylvania’s redistricting, *see Mellow*, 607 A.2d at 210, this Court underscored in 2018 that the “overarching objective” of the Pennsylvania Constitution’s Free and Equal Elections Clause in any redistricting case “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 I*, 178 A.3d



at 817. Accordingly, in considering compliance with neutral redistricting criteria, this Court has emphasized that the criteria are not just goals in and of themselves, but are also a means of assessing whether a plan will treat Pennsylvania voters of both parties equally. And to further evaluate whether a plan meets that constitutional requirement, this Court has considered partisan fairness metrics like the “efficiency gap” and the “mean-median gap.” *Id.* at 774, 817.<sup>8</sup>

Moreover, in conducting its analysis four years ago, this Court observed that advancements in map-drawing technology and analytical software could “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.” *Id.* at 817. Those advances have now arrived, so an evaluation of minimal compliance with the “floor” is insufficient to guard against vote dilution. Rather, ensuring equal representation requires further analysis using partisan fairness metrics. As evidenced by the fact that some of the Submitted Plans

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<sup>8</sup> An “efficiency gap” is “a formula that measures the number of ‘wasted’ votes for one party against the number of ‘wasted’ votes for another party,” where “[t]he larger the number, the greater the partisan bias.” *LWVI*, 178 A.3d at 777. The “mean-median gap” similarly measures partisan bias by calculating the difference between the average and median vote share per party in each district, where a difference between zero to four percent is considered “normal,” but greater gaps demonstrate an “extreme partisan skew of voters” that “is not an outcome that naturally emerges from Pennsylvania’s voter geography.” *Id.* at 776.



that satisfy the “floor” on traditional redistricting criteria nevertheless unfairly dilute votes, partisan fairness metrics should be given even more weight in this proceeding—not less, as the Special Master recommends.

**a. The Carter Plan exhibits exceptional partisan fairness, unlike many of the other Submitted Plans.**

The Carter Plan performs exceptionally—and far better than most other plans, especially Republican-drawn plans—on partisan fairness metrics. While partisan data was not considered in the drawing of the Carter Plan, Dr. Rodden analyzed the partisanship of his and the other Submitted Plans after they were drawn. Rodden Initial Rep. at 23 (Jan. 24, 2022); N.T. at 118. His analysis—and the analysis of other experts for competing parties in this case—shows that, on numerous metrics, the Carter Plan is exceedingly fair.

The Carter Plan is tied for best among all Submitted Plans on the “direct majority responsiveness” metric, which measures the number of times that the political party whose candidate won the statewide vote also carried most of the plans’ congressional districts. Under that metric, the Carter Plan tied for the fewest anti-majoritarian outcomes, and those outcomes favored different parties—another indicator of partisan fairness. *See* DeFord Rebuttal Rep. at ¶¶ 30, 31 tbl. 9 (Jan. 26, 2022); N.T. at 136–38.

On the efficiency gap metric previously relied on by this Court, the Carter Plan achieves the score closest to zero, the best among all Submitted Plans and a



strong indication that the Carter Plan treats voters from both parties equally. *See* DeFord Rebuttal Rep. at 18 fig. 4 (Jan. 26, 2022); N.T. at 402 (Dr. Duchin explaining that the Carter Plan “has [an] especially excellent efficiency gap”; “the best one”). The Carter Plan also ties for best mean-median difference among all plans. *See* Gressman January 29, 2022 Post-Trial Submission, Ex. 1 at 2 (showing mean-median difference analysis for each plan).

The Special Master’s focus on whether particular plans, based on their scores, “favor Democrats” or “favor Republicans,” *see* Rep. at 168–75, is misguided because these metrics are meant to show degrees of partisan skew based on the deviation from zero, regardless of which direction (and thus party) the plan favors. *See* N.T. at 260 (Dr. DeFord agreeing that “closest to zero [] is an indication of treating voters from each party equally”); N.T. at 371 (Dr. Duchin explaining that “closest to zero . . . is where you want to be” on all the partisan fairness metrics).<sup>9</sup>

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<sup>9</sup> Regardless, all of the scores reported by Dr. Duchin and Dr. DeFord show that any slight partisan skew inherent in the Carter Plan favors Republicans. The fact that one expert, Dr. Barber, reported an efficiency gap for the Carter Plan that “favor[s] Democrats” does not negate the other reported efficiency gap figures, which “favor[] Republicans.” Moreover, multiple courts have concluded that Dr. Barber’s testimony should be given little weight or no credit. N.T. at 563–64. For example, in a 2019 North Carolina case, *Common Cause v. Lewis*, the court identified several shortcomings in Dr. Barber’s analysis and, in light of those findings, gave little weight to his testimony. N.T. at 564–65. Dr. Barber’s methodology is also unsound because of the techniques that he has relied on. *See* N.T. at 366–67 (explained by Dr. Duchin). For example, Dr. Barber is not qualified to render opinions about the use of simulated districting plans through algorithms. Dr. Barber has limited



Consistent with its performance on these fairness measures, and based on recent election data, the Carter Plan creates eight districts where Democrats are expected to win, one of which (District 8) is potentially quite competitive; eight districts where Republicans are quite likely to win, two of which are at least potentially competitive (1 and 10); and one district (District 7) that is a toss-up with a very slight Democratic lean. Rodden Initial Rep. at 25 (Jan. 24, 2022). Overall, the anticipated number of Democratic seats in the Carter Plan is nine, consistent with the partisan breakdown in Pennsylvania. Rodden Rebuttal Rep. at 9–10 (Jan. 26, 2022). Consistent with its least-change approach, the Carter Plan retains ten metropolitan districts that, under the 2018 Remedial Plan, saw an average Democratic vote share above 50 percent. Rodden Initial Rep. at 23 (Jan. 24, 2022). However, the Republican incumbent in District 1, Brian Fitzpatrick, has typically outperformed his party by over seven percentage points, resulting in a likely Republican district instead of an apparently reliably-Democratic district.

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experience using an algorithm to generate simulated plans prior to January 2022, and he has never published in the areas of redistricting, partisan influence in the redistricting process, or simulated redistricting analyses. *See* N.T. at 561–63. Additionally, Dr. Barber’s execution of his methodology of simulated redistricting is suspect because there were “clear errors of calculation” that call into question the accuracy of his analyses, including, for instance, partisan fairness. N.T. at 368. In sum, Dr. Barber is not credible, his analysis is methodologically unsound, and his conclusions are unreliable. The Court thus should not credit Dr. Barber’s testimony and conclusions.



Accordingly, the *true* anticipated number of Democratic seats in the Carter Plan is nine. Rodden Rebuttal Rep. at 9–10 (Jan. 26, 2022).

While a couple of the other Submitted Plans are comparably fair to the Carter Plan, *see* Rodden Rebuttal Rep. at 9 (Jan. 26, 2022), others dilute Pennsylvanians' votes by providing undue structural advantages to one political party at the expense of the other. N.T. at 135-36. For instance, the HB 2146 Plan, recommended by the Special Master, and Voters of PA Plan, each produce a majority of Republican-leaning districts despite Democrats' overall statewide majorities. Rodden Rebuttal Rep. at 10 (Jan. 26, 2022); N.T. at 131. Both Rescenthaler Plans similarly produce eight comfortable Republican seats and an unusually low number of comfortable Democratic seats. Rodden Rebuttal Rep. at 10 (Jan. 26, 2022); N.T. at 130-31. All four of these plans unusually skew the distribution of Democratic vote share across districts, suggesting unfair bias and vote dilution.

The HB 2146 Plan and the Rescenthaler Plans are the most biased plans and thus do the most to dilute Pennsylvanians' votes. The Rescenthaler Plans have the highest efficiency gap of all the plans, demonstrating that the plans clearly favor Republicans. DeFord Rebuttal Rep. at 18 (Jan. 26, 2022); N.T. at 135-36. The Rescenthaler Plans, along with the HB 2146 Plan, performed particularly poorly on a mean-median analysis of partisan fairness because they consistently produced outcomes favoring Republicans. N.T. at 135-36. Even the expert called to testify by



the proponents of the HB 2146 Plan admitted that under his analysis of mean-median scores, HB 2146 and the two Reschenthaler Plans were the most biased of all the Submitted Plans, and all three were particularly biased in favor of the Republican Party. N.T. at 575-78.<sup>10</sup> Most notably, in terms of partisan fairness metrics, the HB 2146 Plan performs much like the 2011 congressional plan that was struck down by this Court as an unconstitutional partisan gerrymander. *See* N.T. at 364–65.

As for other Submitted Plans, the Senate Democratic Caucus Plan Number 1 produces fewer comfortable Democratic seats than almost every other plan. Rodden Rebuttal Rep. at 9–10 (Jan. 26, 2022). Of the remaining Submitted Plans, some produce a greater number of comfortable Democratic seats, and others are unusual in that they fail to produce many districts that are competitive. *Id.*

**b. The Special Master’s partisan fairness analysis was flawed and contrary to this Court’s precedent.**

Rather than choose among the Submitted Plans that exhibited the most partisan fairness based on objective metrics largely agreed upon by the testifying experts, the Special Master instead gave the most weight to only those plans that exhibited the *least* partisan fairness—*i.e.*, those that were the most biased in favor of Republicans. The Special Master’s decision to do so was premised on the

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<sup>10</sup> For the reasons set forth above, *supra* note 8, Dr. Barber’s testimony should be given little weight, if any. But if any of his testimony should be credited, it should be his admissions (substantiated by other experts) about the high degree of partisan bias of HB 2146 and the Reschenthaler Plans.



meritless theory that, in light of Pennsylvania's political geography naturally favoring Republicans, a fair map which treats the two political parties equally—and thus does not dilute votes—must have impermissibly prioritized partisanship. This analysis is wrong for a host of reasons.

First, as explained above, the Free and Equal Elections Clause of the Pennsylvania Constitution prohibits “the dilution of an individual’s vote” and mandates “that the power of [an individual’s] vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens.” *LWV I*, 178 A.3d at 817. Accordingly, partisan fairness is a constitutional requirement that the neutral redistricting criteria are meant to protect—indeed, this Court struck down the 2011 map as unconstitutional precisely because it unfairly advantaged one political party. In suggesting the opposite, the Special Master relies on a 2013 Pennsylvania Supreme Court decision and federal law, neither of which can supersede this Court’s more recent pronouncement in *League of Women Voters*. Rep. at 176–77. Moreover, the superiority of the Carter Plan is not predicated on some simple proportional representation standard, and the *Carter* Petitioners and others do not ask this Court to adopt one. Rather, they urge the Court to use a range of partisan fairness measures to evaluate whether a particular plan treats voters from different political parties equally—just as this Court did in *League of Women Voters*, and as is required under the Pennsylvania Constitution.



Second, the Special Master's emphasis on Pennsylvania's political geography (or "human geography") is misplaced. There is no asterisk in the Free and Equal Elections Clause explaining that a plan must treat voters equally only to the extent that it does not deviate from the *default* political geography of the state. Instead, traditional redistricting criteria itself provide the backstop to ensure that a plan's partisan makeup does not deviate from what the political geography *allows*. The Carter Plan meets all of the neutral, geography-based redistricting criteria described above. As Dr. Rodden, the author of the political geography paper that the Special Master credited in drawing her erroneous conclusions, stated in no uncertain terms, "it is not the case that the human geography in Pennsylvania somehow requires that we draw unfair districts." N.T. at 192.

Relatedly, the Special Master's reliance on a simulations analysis is misplaced in this context. As Dr. Rodden explained in his testimony, a simulations analysis "is a technique that's used to identify gerrymandering and . . . to understand some aspects of political geography." N.T. at 157–58; *see also* N.T. at 275–76 (Dr. DeFord noting that simulations are more applicable in other contexts). As a threshold matter, none of the maps are subject to a partisan gerrymandering challenge, meaning that the analysis is not well-suited to the dispute. Even so, despite the limitations of political geography, fair Pennsylvania congressional maps are not absent from a simulations analysis: in the "Pennsylvania congressional context," "a good share of



[ ] simulations end up in a range that . . . produces . . . partisan fairness.” N.T. at 192; *see also* N.T. at 392 (Dr. Duchin explaining that her ensembles created “tens of thousands of examples that do well on partisan fairness but were made with no partisan data”). Therefore, especially given that partisan fairness is a constitutional goal, there is no legal value in comparing maps to the *average* map in a set of simulations. N.T. at 383, 386–87 (Dr. Duchin explaining that it is a “conceptual mistake” to assume that “typical is necessarily fair”; “Sometimes you want to be an outlier and you want to be an outlier in the direction of better scores and better upholding the principles.”). Indeed, even Dr. Barber acknowledged that if two maps are equivalent with respect to the traditional redistricting criteria, it is better to choose one with less bias and more fairness or symmetry than one that is more biased and less fair or symmetrical. N.T. at 582–86. In short, statewide partisan fairness metrics serve as the most relevant means of determining if a map is compliant with the criteria articulated in *League of Women Voters*, so long as the maps that achieve partisan fairness on those metrics also resemble other maps on traditional criteria.

In any event, the Special Master’s misguided assumption that plans achieving partisan fairness necessarily result from intentional gerrymanders, *see* Rep. at 176–78, must be dispelled as to the Carter Plan, as it is the *only* plan for which the map-drawer testified regarding his process and intent. And Dr. Rodden explained that he



drew the 17-district map without considering partisan outcomes and certainly without any intent to favor Democrats.

## **2. The Carter Plan is undisputedly the least-change plan.**

There is no dispute that the Carter Plan best preserves the lines and cores of the 2018 Remedial Plan's districts.

Core preservation is a historical consideration in this state's redistricting process. *LWV I*, 178 A.3d at 817 (“We recognize that other factors have historically played a role in the drawing of legislative districts, such as the preservation of prior district lines . . . .”); *see also Mellow*, 607 A.2d at 208. Moreover, courts commonly deploy a least-change strategy when, as here, the existing map is rendered obsolete by population changes. *See LaComb v. Growe*, 541 F. Supp. 154, 151 (D. Minn. 1982) (stating that the “starting point” for new, court-drawn congressional districts is the last configuration of districts); *see also Johnson v. Wis. Elections Comm’n*, 2021 WI 87 ¶ 81 (plurality op.), ¶ 87 (Hagedorn, J., concurring) (Wis. Nov. 30, 2021) (holding that judicially adopted plans should attempt to minimize changes from the previous map); *Hippert v. Ritchie*, 813 N.W. 2d 374, 380 (Minn. 2012) (explaining that the judicial redistricting panel “utilizes a least-change strategy where feasible”). Furthermore, when courts do make any changes that are not strictly necessary, such changes are often made only to achieve fair outcomes. *See Prosser v. Elections Board*, 793 F. Supp. 859, 867 (W.D. Wis. 1992) (per curiam) (“We are comparing



submitted plans with a view to picking the one (or devising our own) *most consistent with judicial neutrality*. Judges should not select a plan that seeks partisan advantage. . . .”) (emphasis added).

By taking the least-change approach, the *Carter* Petitioners were able to preserve the core of the 2018 Remedial Plan’s districts and create continuity for the overwhelming majority of Pennsylvania residents. *See Karcher*, 462 U.S. at 740 (recognizing that preserving district cores is a traditional principle of redistricting); *Reynolds*, 377 U.S. at 578–79 (same). And as described above, the 2018 Remedial Plan is an especially useful benchmark for any plan evaluated by this Court because it is the product of a careful judicial process and has already been extensively vetted and analyzed according to redistricting criteria. N.T. at 88-89.

Among the Submitted Plans, the Carter Plan makes the least changes to, and is least disruptive of, the 2018 Remedial Plan, which is an additional and reasonable basis to prefer that plan over others. *See Duchin Initial Rep.* at 7 (Jan. 24, 2022); N.T. at 410–11. The Carter Plan retains 86.6 percent of Pennsylvania’s population in the same congressional districts to which they were assigned in the 2018 Remedial Plan, well above the plan with the next-highest retention share. Rodden Rebuttal Rep. at 2 (Jan. 26, 2022); N.T. at 407–08 (Dr. Duchin stating that the Carter Plan has a “superlative least change score” and “just laps had [sic] field when it comes to least change”). Although the Special Master expressed concern about how to



prioritize the Submitted Plans on a least-change metric, *see* Rep. at 185 (FF7), there was no dispute among experts that Dr. Rodden's retained population share calculations are sufficient to show that the Carter Plan's districts retain more of their former populations than any other Submitted Plan, and is thus closest to the 2018 Remedial Plan. N.T. at 346–47; 407–08.

Notably, as discussed above, the Carter Plan's least-change approach required no sacrifice of any traditional redistricting criteria outlined by this Court: it meets or surpasses the 2018 Remedial Plan on population equality, compactness, contiguity, and political subdivision splits, and it performs as well or better than the Submitted Plans on all other redistricting criteria.

The Special Master's criticisms of the Carter Plan's approach, *see* Rep. at 183–88, are misguided and unsupported. First, the Special Master erroneously contends that this Court rejected the least-change approach in *Holt*. Instead, this Court simply explained that its “prior ‘approvals’ of plans do not establish that those plans survived not only the challenges actually made, but all possible challenges.” *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 735 (Pa. 2012). Here, the 2018 Remedial Plan was not just “approved,” but was drawn by this Court specifically to meet all relevant criteria. Furthermore, the *Carter* Petitioners do not contend that the 2018 Remedial Plan should be blindly re-adopted because it was previously approved, but rather believe that such a map is the most logical and



reasonable starting point for drawing a new plan that similarly complies with all other criteria this Court considers.

Second, approving the *Carter* Petitioners' approach would not, as the Special Master contends, *see* Rep. at 188 (FF11–12), inoculate future plans from further challenges. In drawing the Carter Plan, Dr. Rodden did not indiscriminately assume the 2018 Remedial Plan's constitutionality; he made changes when necessary to further some legitimate goal (for example, to account for population shifts, further decrease political subdivision splits where possible, and reunite communities of interest) and evaluated the Carter Plan along the same criteria as every other plan. Still, to the extent the Special Master's concerns hinged on this Court's critique of any "supposed constitutionalization of prior redistricting plans," that concern was for plans drawn through the "inherently political" redistricting process at issue in the state legislative context—not plans previously evaluated and adjudicated fair by the judiciary. *Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1234–36 (Pa. 2013).

Ultimately, the Court should adopt the Carter Plan because it simultaneously meets or surpasses the 2018 Remedial Plan and the Submitted Plans on every one of the traditional redistricting criteria outlined by the Pennsylvania Supreme Court, while also better preserving the core of the 2018 Remedial Plan's districts and



creating important continuity for the overwhelming majority of Pennsylvania residents.

**3. The Carter Plan performs well on the other historical redistricting criteria.**

**a. The Carter Plan protects communities of interest.**

In *LWV I*, this Court interpreted the state’s constitution to provide “great[] emphasis on creating representational districts that . . . maintain the geographical and social cohesion of the communities in which people live.” 178 A.3d. at 814–15. The 2018 Remedial Plan was very careful to avoid splitting communities. By generally retaining the boundaries of the 2018 Remedial Plan and changing district lines only where necessary to reflect variable population changes, the Carter Plan specifically sought to preserve communities determined to be important by this Court and its map-drawer. For instance, the Carter Plan retained the arrangement of districts in the Philadelphia area and its surrounding counties. Rodden Initial Rep. at 12–13 (Jan. 24, 2022). It also respects communities of interest by, among other things, keeping Pittsburgh within one district, keeping the city of Harrisburg whole, and attaching the surplus population of Philadelphia to Delaware County. *See LWV*



*I*, 178 A.3d at 750; *see also* Rodden Initial Rep. at 8 (Jan. 24, 2022); Naughton Response Rep. at 8–9 (Jan. 26, 2022); N.T. at 101–04.<sup>11</sup>

The Carter Plan was also able to reunify certain communities of interest that were separated in the 2018 Remedial Plan. For instance, because District 7 required additional population, Carbon County was added to unify the Allentown-Bethlehem-Easton metropolitan statistical area consisting of Northampton, Lehigh, and Carbon Counties. Rodden Initial Rep. at 14 (Jan. 24, 2022). Likewise, the new District 15, which had to change significantly due to population changes and the loss of what is

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<sup>11</sup> Dr. Naughton is not qualified to render opinions about redistricting plans. He is not a computer scientist or mathematician. N.T. at 688–89. Instead, Dr. Naughton’s claim of expertise is rooted in his “15 years working in Pennsylvania campaign politics” and his work for various Republican candidates. N.T. at 687–88. Dr. Naughton has not appeared as an expert witness in redistricting litigation before, has no particular experience in redistricting, and has never tried to draw a redistricting plan for Pennsylvania. N.T. at 777–78. Dr. Naughton is also unable to offer any objective insight into the critical topics of redistricting because his career has largely been devoted to helping Republican political candidates, and he was retained by Republican politicians in this litigation to offer an opinion about their proposed map. N.T. at 769–70. Moreover, he purported to know the preferences of voters in numerous locations around the Commonwealth, yet admitted that he had done no relevant polling of Pennsylvanians and, in any event, has not worked on a campaign in the state since 2015 (other than one minor engagement for a Superior Court candidate). N.T. at 777. Dr. Naughton is not credible, his analyses are methodologically unsound, and his conclusions are unreliable. For these reasons, Dr. Naughton’s testimony should be given little weight, if any. To the extent the Court credits his testimony about communities of interest, however, it is additional evidence supporting the Carter Plan’s respect for communities of interest: Every single map-drawing choice that Dr. Naughton advocated for and the Special Master credited as evidence of maintaining communities of interest is reflected in the Carter Plan. *See generally* Rodden Initial Rep. at 12–20 (Jan. 24, 2022).



District 12 under the 2018 Remedial Plan, now avoids a split of Centre County that had previously separated State College from some of its suburbs. *Id.* at 18.

The Special Master's findings regarding the Carter Plan's treatment of communities of interest defy the record. In particular, contrary to the finding that Dr. Rodden "did not explicitly examine or appear to have considered the specific considerations that need to be taken into account when establishing that splits maintain the surrounding communities of interest," Rep. at 156 (FF12), Dr. Rodden deliberately constructed the Carter Plan to ensure the maintenance of communities of interest—both those that were protected by the Court in 2018 and those that were not. And, as discussed above, to the extent the Carter Plan had to alter the boundaries of the 2018 Remedial Plan to account for population changes and the Commonwealth's loss of a congressional seat, it did so with a focus on maintaining natural and political subdivision boundaries and keeping communities whole.

**b. The Carter Plan protects minority voting rights.**

The Carter Plan maintains the protection of minority voting rights reflected in the 2018 Remedial Plan. Federal law requires that districts be drawn to protect the equal opportunity of racial, ethnic, and language minorities to participate in the political process and elect candidates of their choice, whether alone or in alliance with others. Voting Rights Act of 1965, 52 U.S.C. § 10301(b) (2018). And districts must not have the purpose or effect of denying or abridging the voting rights of any



United States citizen on account of race, ethnicity, or membership in a language minority group. U.S. Const. Amend. XIV, XV; 52 U.S.C. § 10301(a).

The Carter Plan complies with these criteria because Dr. Rodden did not consider racial data in drawing district lines. Rodden Initial Rep. at 23 (Jan. 24, 2022); N.T. at 117. Notably, the Carter Plan stands alone among the Submitted Plans in this regard—because Dr. Rodden was the only map-drawer to testify, no other plan proponent can point to any direct evidence that its plan did not consider racial data. *See, e.g.*, N.T. at 288. Moreover, because the Carter Plan closely follows the boundaries of the 2018 Remedial Plan with regard to those areas of the state with sizeable minority populations, it has preserved the minority opportunity districts that the Pennsylvania Supreme Court approved in 2018. *See* DeFord Rebuttal Rep. at 20 tbl. 14 (Jan. 26, 2022) (2018 Remedial Plan and Carter Plan both have two majority-minority districts); *see also* N.T. at 190–91 (Dr. Rodden testifying that his analysis of racial data as it relates to the Carter Plan consisted of confirming that the Plan reflected hardly any changes in the minority communities from the 2018 Remedial Plan, which is compliant with the Voting Rights Act).

**c. The Carter Plan protects incumbents.**

The Carter Plan adequately protects incumbents. This Court in *LWV I* recognized that the “protection of incumbents” has “historically played a role in the



drawing of legislative districts.” 178 A.3d at 817; *see also Mellow*, 607 A.2d at 207 (avoiding contests between incumbents is a legitimate objective in districting).

Because the Carter Plan makes minor changes to most districts, incumbents have not been inadvertently removed from any existing districts. The single circumstance in which the Carter Plan places two incumbents in the same district was unavoidable. Rep. Keller currently represents District 12, which will no longer exist because of population loss. Under the Carter Plan, he now is located in District 15, along with incumbent Rep. Thompson, another rural representative. This decision, though, had no impact on the Carter Plan’s satisfaction of traditional redistricting criteria. Rodden Initial Rep. at 23 (Jan. 24, 2022).

Though the Special Master recognized that the loss of one district would require the pairing of at least one set of incumbents in one district, Rep. at 178 (FF1), she errs in claiming that the “significance” of an incumbent pairing is contingent upon the party affiliations of the candidates that have been paired together. Rather, if the premise is that districts should be drawn to avoid contests between incumbents, *see Mellow*, 607 A.2d at 207, then any plan that pairs two incumbents together should be given the same weight—the party of the individual incumbents that are paired is inapposite to the inquiry. To the extent partisan fairness is a concern, that is best evaluated by the metrics discussed above, and not merely by counting incumbents.



**C. No legislative deference is owed to a plan that is not duly enacted.**

No deference should be given to any particular plan proposed in this litigation, especially not to the HB 2146 Plan. Instead, all Submitted Plans must be evaluated along the same criteria and “must be considered on the same footing.” *Mellow*, 607 A.2d at 215 (Special Master’s Report).

The Special Master posited that HB 2146 should receive preference because courts must defer to redistricting plans that reflect state policy. *See* Rep. at 213–17 (citing *Upham v. Seamon*, 456 U.S. 37 (1982) and *Perry v. Perez*, 565 U.S. 388 (2012)). This is incorrect as a matter of law and reasoning. The Special Master misses a critical distinction between the maps at issue in *Upham* and *Perry* and HB 2146—namely, whether the maps were duly enacted under state constitutional requirements. Here, as the Special Master has recognized, Governor Wolf’s veto of HB 2146 means that the “bill never obtained the official status of a duly enacted statute.” Rep. at 213 ¶ 91. But the Special Master appears to discount the Governor’s veto by citing the supposed lack of cognizable legal objections to the constitutionality of HB 2146. *Id.* However, it is not for the Special Master, or any court for that matter, to discount the weight given to a Governor’s veto.

HB 2146 is, at most, simply another proposal that this Court should consider with all other Submitted Plans before it. *See Wis. Elections Comm’n*, 2021 WI at ¶ 86, n.15 (Nov. 30, 2021) (Hagedorn, J., concurring) (describing Legislature’s



submission of redistricting bill that was vetoed by governor as “mere proposals deserving no special weight”). After all, under the Pennsylvania Constitution, the lawmaking process of the Commonwealth belongs to *both* the General Assembly and the Governor, who has veto power over proposed laws. *See* Pa. Const. art. IV, § 15. Where a state constitution requires the participation of both the legislative and executive branches in the lawmaking process, a redistricting plan that the Governor has vetoed is not enforceable as a matter of law. *See Smiley v. Holm*, 285 U.S. 355, 373 (1932); *see also Ariz. State Legis. v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 807 (2015).

A legislative reapportionment plan that has been vetoed by the Governor represents merely the legislature’s “proffered” plan, and, where the Governor has a contrary recommendation, does not reflect “the State’s policy.” *Sixty-Seventh Minn. State S. v. Beens*, 406 U.S. 187, 197 (1972); *see also Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982) (explaining that a vetoed legislative plan “cannot represent current state policy any more than the Governor’s proposal”). As a result, where, as here, the political branches have failed to enact redistricting plans, one branch’s preferred plan cannot represent the policies and preference of the state any more than any other law that has failed to meet the constitutional requirements for legislative enactment. Thus, none of the Submitted Plans is due particular deference as a statement of state policy or the will of the people. *See, e.g., Smith v. Clark*, 189 F.



Supp. 2d 529, 533–34 (S.D. Miss. 2002) (holding that where the state “failed to enact a congressional redistricting plan . . . there is no expression, certainly no clear expression, of state policy on congressional redistricting to which we must defer”); *Carstens*, 543 F. Supp. at 79 (affording no deference because vetoed redistricting plan was only the “proffered current policy rather than clear expressions of state policy”) (internal citations omitted); *O’Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) (“[W]e are not required to defer to any plan that has not survived the full legislative process to become law.”); *Essex*, 874 F. Supp. 2d at 1084 (D. Kan. 2012) (“Regardless which option our constitutional analysis prompts us to choose, we owe no deference to any proposed plan, as none has successfully navigated the legislative process to the point of enactment.”).

For these reasons, in impasse litigation, vetoed redistricting plans should not receive deference. *See, e.g., Wis. State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 632 (E.D. Wis. 1982) (three-judge panel) (court explaining in impasse litigation that “[t]he vetoed plan has been submitted to us for our consideration and, after reviewing it, we conclude that it is one of the worst efforts before us and for that reason we decline to adopt it. The plan has, in our opinion, no redeeming value.”); *Ritchie*, 813 N.W.2d at 379 n.6 (Minn. 2012) (court in impasse litigation refusing to adopt or show deference to the Minnesota Legislature’s redistricting plan because it “was never enacted into law”). Recently, for example, Wisconsin’s Legislature asked the



Wisconsin Supreme Court to do the same thing the Special Master recommends to this Court—to give their map special deference. But the Wisconsin Supreme Court, recognizing that the Legislature’s maps “did not survive the political process,” explicitly refused to give the Legislature’s plans any special status. *See Wis. Elections Comm’n*, 2021 WI 87 at ¶ 72 n.8; *see also id.* (J. Hagedorn, concurring) at ¶ 86 n.15 (describing the Legislature’s submission as “mere proposals deserving no special weight”).

The *Carter* Petitioners are not aware of any court that has adopted a legislature’s vetoed map in impasse litigation since the 1970 redistricting cycle, and those decades-old cases are not comparable to the circumstances before the Court today. In *Skolnick v. State Electoral Board of Illinois*, the court adopted a legislatively proposed plan only after independently concluding that the plan was superior to other plans across a range of traditional redistricting criteria and highlighting that the plan had received “substantial bipartisan support” in the legislature, 336 F. Supp. 839, 846 (N.D. Ill. 1971), which, of course, is not the case here. In *Donnelly v. Meskill*, the court similarly did not adopt the legislature’s map wholesale but instead made changes to the plan which addressed, in large part, the Governor’s reason for vetoing the plan. 345 F. Supp. 962 963–65 (D. Conn. 1972) (explaining the Governor’s veto because of the legislature’s significant and impermissible population deviations, and the court’s adjustment of the legislature’s



plan to ensure it reached virtual population equality). Thus, neither case stands for the proposition that courts should afford any deference to, let alone adopt, a legislature's plan in impasse litigation when the plan has not been enacted into law.

Moreover, in prior Pennsylvania impasse litigation, neither this Court nor special masters appointed to assess the merits of proposed redistricting maps have given preferential treatment to reapportionment plans put forth by legislators. Specifically, in 1992, the Pennsylvania Supreme Court appointed a Special Master from the Pennsylvania Commonwealth Court to recommend a map for the court to adopt after Pennsylvania's political branches failed to successfully enact a redistricting plan on their own. *See Mellow*, 697 A.2d at 205–06. In that proceeding, the Special Master received six different plans submitted by various groups, including by various lawmakers. *Id.* at 205. Before engaging in a detailed analysis comparing the maps before him, the Special Master specifically noted in his opinion to the court that all plans “must be considered on the same footing.” *Id.* at 215. Thus, this Court must consider all Submitted Plans on equal footing, just as it did in *Mellow*.

Finally, seeking to elevate a plan that failed enactment relies on a perilous notion of legislative supremacy that is contrary to fundamental constitutional principles. Presentment to the executive is an essential component of enacting legislation. *See* Pa. Const., art. IV, § 15 (requiring presentment of bills to the



Governor); *Scarnati v. Wolf*, 173 A.3d 1110, 1120 (Pa. 2017) (“No bill may become law without first being submitted to the Governor for approval or disapproval.”). Treating a vetoed bill as tantamount to one that was properly enacted under Pennsylvania’s state legislative process would improperly elevate the actions of the legislative branch over that of the executive branch, and in effect eliminate the Governor’s veto power by creating a judicial end-around. Setting a precedent that vetoed bills deserve judicial deference despite failing enactment will create perverse incentives for the legislature to attempt to enact laws that will receive special treatment in the courts as opposed to seeking compromise with the Governor.

At bottom, what matters is that because HB 2146 was vetoed by the Governor, it was not duly enacted by the Commonwealth, is not reflective of state policy, and is thus not entitled to deference under *Upham* or *Perry*. HB 2146 is, at most, simply another proposal that this Court should consider with all other Submitted Plans before it.

#### **IV. CONCLUSION**

The Carter Plan is the only one of the Submitted Plans that satisfies all redistricting criteria and undisputedly exceeds all other Submitted Plans on one of those criteria—retention of previous districts. This Court should adopt the Carter Plan as the Pennsylvania congressional redistricting plan.



Dated: February 14, 2022

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***Counsel for Carter Petitioners***



# Exhibit A

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**IN THE SUPREME COURT OF PENNSYLVANIA**

CAROL ANN CARTER; MONICA PARRILLA;  
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.

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 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.

No. 7 MM 2022

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**DECLARATION OF JONATHAN RODDEN, Ph.D.**



1. I, Jonathan Rodden, am an adult individual over the age of eighteen (18) and competent to testify as to the matters set forth below.
2. On January 24, 2022, I produced to the Commonwealth Court a congressional redistricting plan (the “Carter Plan”), which I created as described in my initial expert report.
3. On February 7, 2022, counsel for the *Carter* Petitioners asked me to revise the Carter Plan solely to further equalize population across districts and achieve no more than a one-person population deviation where possible.
4. In the previous Carter Plan, I had allowed districts to be either exactly at the target population (4 districts), one person over (4 districts), or one person under (9 districts). In the revised plan, I no longer allow any districts to be one person over. In the revised plan, 12 districts are exactly at the target population and 5 districts are one person below.
5. To do this, I revisited each location along each border where I had either worked with a specific combination of Vote Tabulation Districts (“VTD”) or split a single VTD to equalize population across districts. In most cases, I split the same VTD, but used a slightly different arrangement of census blocks in order to make the requisite one-person change in district population. In one location, due to coarseness in the sizes of blocks that

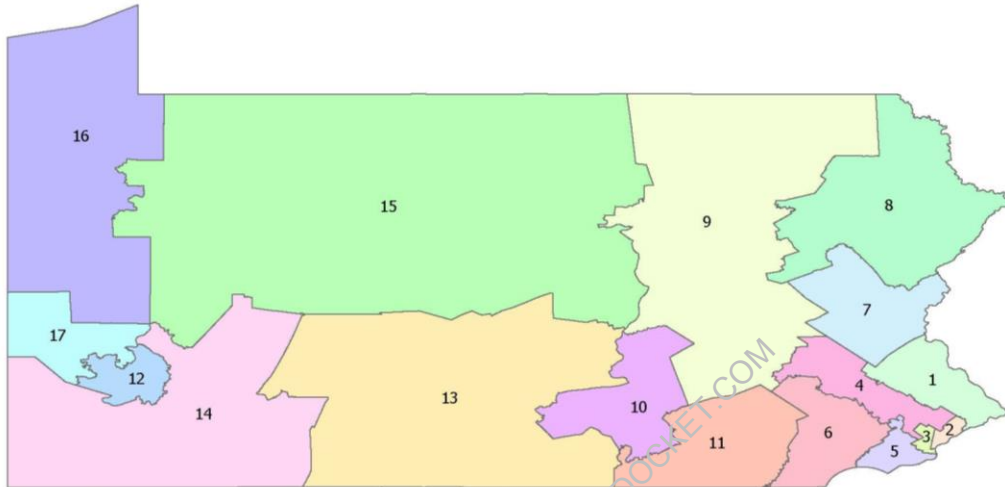


prevented me from achieving the target population total using the blocks in the VTD I had initially split, I split a *different* adjoining VTD, keeping whole the VTD that had been split in the initial Carter Plan. In other words, I did not split an additional VTD, but rather, split an alternative adjoining VTD.

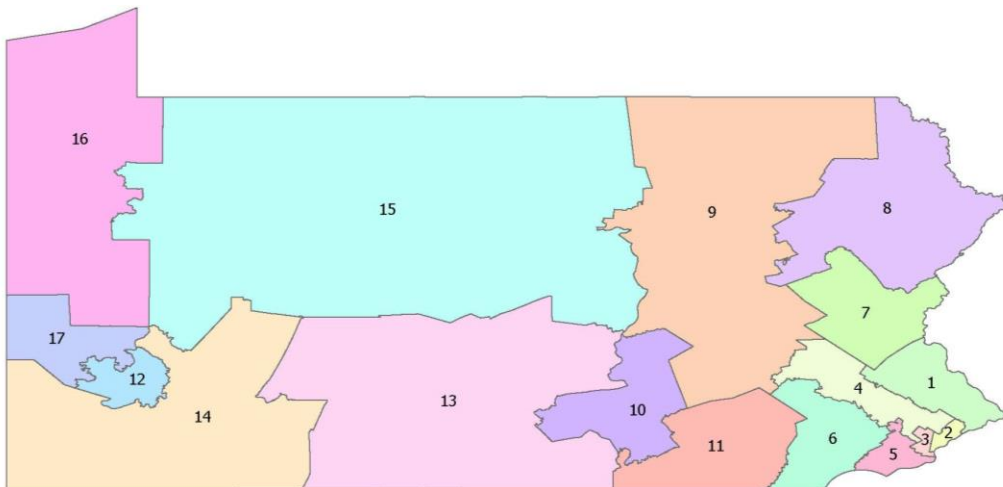
6. In one location, the intersection of Districts 3 and 5 in South Philadelphia, I had been able to avoid splitting any VTDs in the initial Carter Plan. This was no longer possible in my pursuit to achieve zero population deviation, so I had to split an additional VTD in order to achieve zero population deviation between these two districts.
7. Other than this additional VTD split in South Philadelphia, these changes that I made to minimize population deviation do not affect the plan-wide metrics reported for the Carter Plan in the expert submissions I made on January 24 and 26 or in my Commonwealth Court testimony on January 27. In other words, the only change to the reported metrics is an increase in the number of VTD splits, from 14 to 15.



8. The following map depicts the Carter Plan, for which a block equivalency file and shape file were submitted to the Commonwealth Court on January 24, 2022.



9. The following map depicts my revised congressional plan (the “Carter Revised Plan”), for which a block equivalency file and shape file are available to download at <https://ballardspahr.sharefile.com/d-s028ac6af696b4e0ea9122cc758dd4855>.





10. I declare under the penalty of perjury that the foregoing is true and correct.

The statements contained in this Declaration are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

A handwritten signature in black ink, appearing to read 'Jonathan Rodden', written in a cursive style.

Executed on February 14, 2022

---

Jonathan Rodden

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**IN THE SUPREME COURT OF PENNSYLVANIA**

CAROL ANN CARTER; MONICA PARRILLA;  
REBECCA POYOUROW; WILLIAM TUNG; ROSEANNE  
MILAZZO; BURT SIEGEL; SUSAN CASSANELLI; LEE  
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No. 7 MM 2022

**CARTER PETITIONERS' EXCEPTIONS TO  
THE SPECIAL MASTER'S REPORT**



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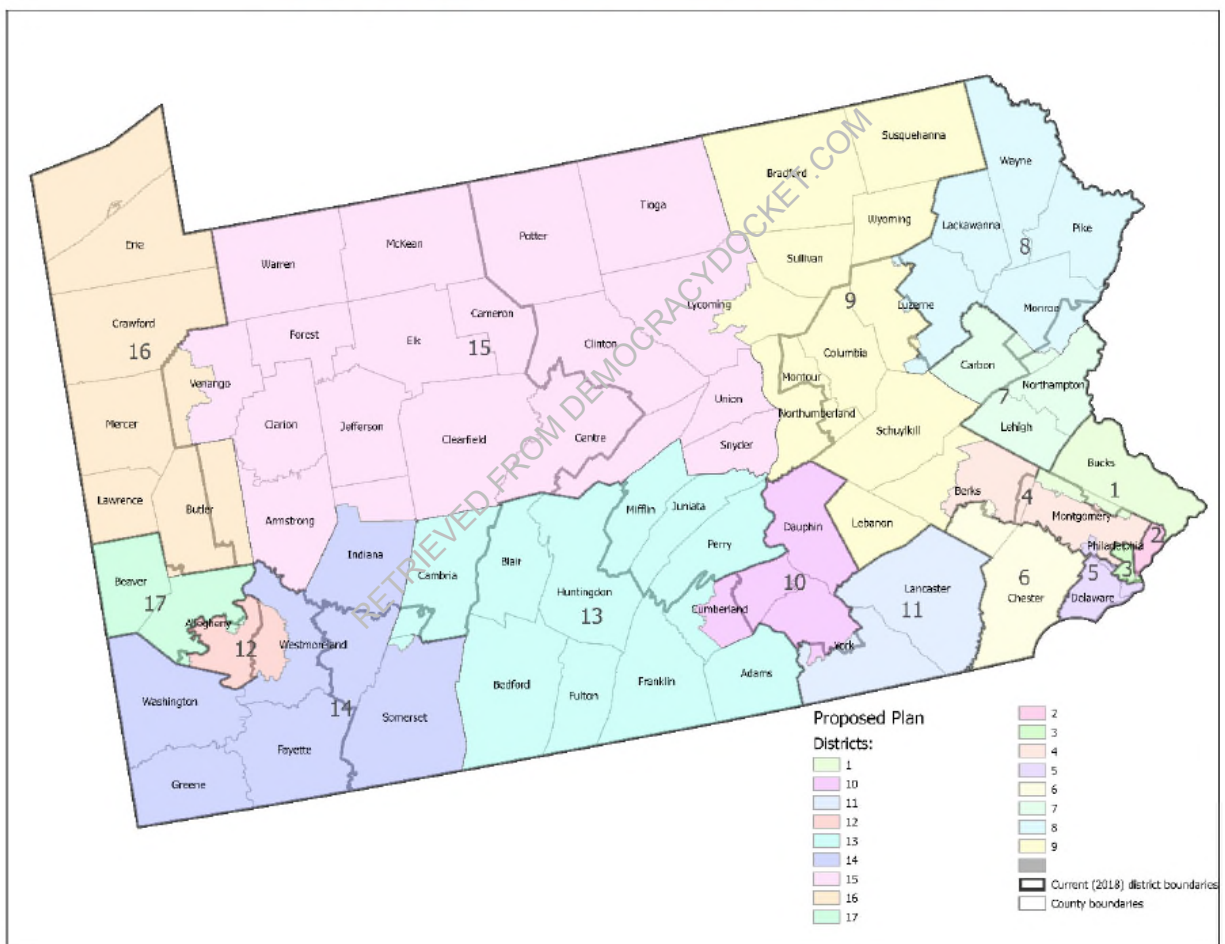
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## I. General Exception

1. Erred in failing to display an image of the Carter Plan, in contrast to all the other plans under consideration (the “Submitted Plans”), which were each included in the Commonwealth Court’s Report & Recommendation (“Rep.”). *See* Rep. at 44 (FF1). For reference, the Carter Plan has been reproduced below.

**Figure 5: Proposed Congressional District Boundaries**



## II. Expert Reports and Testimony

2. Erred in finding that all experts in the case were equally qualified to offer expert opinions, regardless of whether the experts or their reports had been



subject to cross examination, and what that cross examination revealed. *See Rep. at 114 (FF338).*

3. Erred in admitting into evidence additional expert reports submitted by Dr. Thomas Brunell on behalf of the Congressional Intervenors and Dr. John Memmi on behalf of the Senate Republican Intervenors. *See Rep. at 114–15, 117.*

4. Erred in electing to credit opinions, analyses, and conclusions of certain experts, including Dr. Michael Barber and Dr. Keith Naughton, but inconsistently crediting the opinions, analyses, and conclusions of other experts, such as Dr. Jonathan Rodden, Dr. Daryl DeFord, and Dr. Moon Duchin.

**A. Dr. Jonathan Rodden (*Carter* Petitioners)**

5. Erred in failing to find that Dr. Jonathan Rodden was the only expert that testified during proceedings before the Special Master who actually drew the map he or she was offering opinions on, and erred in not according the Carter Plan more weight on that basis. *See Rep. at 58–66 (FF1–51).*

6. Erred by finding that “Dr. Rodden did not give a straight answer” “when asked about his overall conclusions about how the Carter plan compares to the 2018 Remedial Plan.” *Rep. at 61 (FF25).* Dr. Rodden testified that he was “able to quantitatively analyze” how the Carter Plan compares to the 2018 Remedial Plan by “looking at the population data and overlaying the maps . . . to get just a simple measure that says what percentage of the population in each district that [he] created



was already in that district,” which he did “district by district and look[ing] at the plan as a whole,” ultimately concluding that “the maps were very similar . . . and the share of the population that was contained . . . in each district . . . [on] average, . . . was 87 percent.” N.T. at 114–15.

7. Erred by finding that “Dr. Rodden . . . appeared to admit that there may be a slight discrepancy in his calculation of HB 2146’s total county subdivision splits.” Rep. at 64 (FF44). Dr. Rodden testified that “*if* there [was] a slight discrepancy” between his calculation and the Legislative Data Processing Center’s tabulation of HB 2146’s total subdivision splits, it was probably due to “different municipal terminologies” used by Dr. Rodden and the Legislative Data Processing Center. N.T. at 151–53 (emphasis added).

8. Erred by finding that “Dr. Rodden . . . did not conduct a simulation analysis in this case, although he was capable of doing so, because ‘it didn’t occur to [him] that drawing a [sic] 100,000 other plans was something that [he] should do.’” Rep. at 65 (FF46) (alterations in original). Dr. Rodden testified that, in this case, he was “asked to draw . . . a plan and evaluate its fairness,” whereas the simulations analysis “is a technique that’s used to identify gerrymandering and . . . to understand some aspects of political geography.” N.T. at 158.



**B. Dr. Michael Barber (House Republican Intervenors)**

9. Erred in failing to find that Dr. Barber has limited experience using an algorithm to generate simulated plans prior to January 2022 and has never published in the areas of redistricting, partisan influence in the redistricting process, or simulated redistricting analyses, and thus erred in crediting Dr. Barber's simulations where there is no basis to do so. *See* Rep. at 165 (FF5, 8); 176 (FF20–23); 209 ¶ 66; *see also* N.T. at 561–62.

10. Erred in failing to find that multiple courts have concluded that testimony given by Dr. Barber should be given little weight or no credit. *See, e.g.*, Rep. at 165 (FF11); *see also* N.T. at 562–66; *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at \*95 (N.C. Super. Ct. Sep. 3, 2019) (“In light of the above shortcomings in Dr. Barber’s analysis, the Court gives little weight to his testimony.”); *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1246 (N.D. Fla. 2020) (not crediting Dr. Barber’s testimony).

11. Erred in failing to find that Dr. Duchin found “clear errors of calculation” in Dr. Barber’s findings. *See, e.g.*, Rep. at 165 (FF11); *see also* N.T. at 368.

12. Erred in finding that any of Dr. Barber’s opinions, calculations, or analyses were credible in light of evidence that Dr. Barber does not have the proper



expertise and credibility and does not employ a replicable and accurate methodology.

**C. Dr. Keith Naughton (Congressional Intervenors)**

13. Erred in crediting the testimony of Dr. Naughton, despite finding that:

a. “Dr. Naughton . . . acknowledg[ed] that he [is] not a mathematician[,] . . . has ‘no particular experience in redistricting,’ and has never served as an expert in redistricting litigation before.” Rep. at 93 (FF215); 95 (FF225); *see also* Rep. at 114 (FF338);

b. “Dr. Naughton conceded that he provided no quantitative analysis of how any of the proposed plans perform on the neutral redistricting criteria” and “Dr. Naughton agreed that his report ‘does not identify any particular methodology’ that he used to arrive at his conclusions, and does not ‘cite any authority or particular evidence for [his] opinions.’” Rep. at 94 (FF219–220); *see also* Rep. at 114 (FF338); and

c. “[M]uch of [Dr. Naughton’s] professional career has been dedicated to helping Republican candidates in Pennsylvania win their seats,” and Dr. Naughton was retained in this case to testify on behalf of Republican interests. Rep. at 94 (FF218); *see also* Rep. at 114 (FF338).



14. Erred in crediting Dr. Naughton's testimony over testimony of other experts in this case that have a proven body of credible expert work. *See, e.g.*, Rep. at 160 (FF22–28).

15. Where the Court found that Dr. Naughton's expertise is based solely on his work experience in Pennsylvania campaign politics, Rep. at 93–94 (FF216–218), and Dr. Naughton admitted that he has not worked in Pennsylvania campaign politics since 2015, *see* Naughton Rebuttal Rep. Appx. 1 at 3; N.T. at 769, erred in crediting Dr. Naughton's testimony that:

a. Pittsburgh voters *presently* tend to particularly favor local candidates in statewide elections, *see* Rep. at 150 (FF10);

b. Pittsburgh voters *presently* share common interests in a representative's advocacy for the acquisition of federal funds and the obtaining of constituent services, *see* Rep. at 150 (FF11); and

c. Voters in Scranton and Wilkes-Barr *presently* prefer to be in separate districts, *see* Rep. at 96 (FF231)

despite Dr. Naughton admitting that he has not conducted or reviewed any public opinion polling in support of his opinions. *See* N.T. at 775–76.

16. Erred in failing to find that Dr. Naughton conflated voter party identification with communities of interest. *See* Rep. at 96 (FF229).



### **III. Traditional Redistricting Criteria**

17. Erred in consistently finding that certain Submitted Plans, such as HB 2146 and the Reschenthaler Plans, are in compliance with the required redistricting principles, but failing to consistently find and credit that other Submitted Plans, such as the Carter Plan, are also in compliance with those same redistricting principles.

#### **A. Contiguity**

18. No errors as to findings on contiguity.

#### **B. Equal Population**

19. Erred in concluding that the maximum population deviation for congressional districts is 10 percent, where that is the standard for state legislative districts only, and the standard for congressional districts is “as nearly equal in population as practicable,” which is satisfied by a deviation of plus or minus one person. *See* Rep. at 138 (CL3); *see also Evenwel v. Abbott*, 578 U.S. 54, 59–60 (2016) (specifying that the 10% maximum deviation threshold applies to state and local legislative districts).

20. Erred in finding and concluding that the Carter Plan is to be given less weight for producing a two-person deviation, as opposed to one-person deviation, where the constitutional requirement that congressional districts be created “as nearly equal in population as practicable” is satisfied by a two-person deviation. *See*



Rep. at 138–39 (CL1–4; FF3). *See Carter Petitioners’ Brief in Support of Exceptions (“Brief in Support”)*, section III.A.1.

### **C. Compactness**

21. Erred in failing to find that the Carter Plan had one of the highest Reock compactness scores out of all of the Submitted Plans. *See Rep. at 141 (FF4)*. *See Brief in Support*, section III.A.2.

### **D. Integrity of Political Subdivisions**

22. Erred in failing to compare across all plans the total number of splits of subdivisions, instead only comparing the number of subdivisions that were split (even if each subdivision was split more than once). *See Rep. at 146 (FF36–38)*. *See Brief in Support*, section III.A.4.

23. Erred in failing to find that the splitting of certain political subdivisions is more important in assessing a plan than the splitting of others, with the split of counties being the most important metric. *See Rep. at 146–47 (FF36–43)*; *see also N.T. at 250–51 (Dr. DeFord agreeing that it is more important to avoid a county split than a borough split)*. *See Brief in Support*, section III.A.4.

## **IV. Historical Redistricting Criteria**

### **A. Communities of Interest**

24. Erred in finding that “Dr. Rodden . . . did not explicitly examine or appear to have considered the specific considerations that need to be taken into



account when establishing that splits maintain the surrounding communities of interest,” where Dr. Rodden did in fact provide extensive and specific discussion in his report and during his testimony about the Carter Plan’s preservation of communities of interest. Rep. at 156 (FF12); *see* Rodden Initial Rep. at 8–20 (Jan. 24, 2022) (specifically detailing decisions and tradeoffs to drawing boundaries for every district in the Carter Plan to achieve population equality, and specifically noting decisions to avoid splits in District 5, and unifying areas in Districts 7 and 15). *See Brief in Support*, section III.B.3.a.

25. To the extent Dr. Naughton’s testimony is to be credited, erred in failing to find that the Carter Plan is consistent with Dr. Naughton’s suggested configurations of communities of interest across the state. Rep. at 151 (FF17), 157–59 (FF15–20); 210–11 ¶¶ 70–75; *see also* Rodden Initial Rep. at 14, 20 (Jan. 24, 2022) (consistent with Dr. Naughton’s testimony, the Carter Plan keeps Bucks County whole, extended Bucks County into Montgomery County, attached portions of South Philadelphia with Delaware County, and did not split the City of Pittsburgh).

### **B. Incumbent Pairing**

26. Erred in failing to find that, due to population loss in the center of Pennsylvania, the district that was eliminated was previously represented by a



Republican representative. *See* Rep. at 178 (FF1), 180 (FF11); *see also* Rodden Initial Rep. at 23 (Jan. 24, 2022). *See Brief in Support*, section III.B.3.c.

27. Erred in finding that the pairing of representatives based on their party affiliation or status as a candidate can be more or less indicative of unfair burdens on incumbents. *See* Rep. at 179 (FF2–5).

**C. Partisan Fairness**

28. Erred in failing to give more weight to the partisan fairness of the Carter Plan, given that it was the only plan expressly drawn without consideration of partisan performance. *See generally* Rep. at 162–76; N.T. at 117–18.

29. Erred in relying on metrics related to human geography and simulations as benchmarks of partisan fairness. *See generally* Rep. at 162–66. *See Brief in Support*, section III.B.1.b.

30. Erred in finding that the difference of “a few percentage points” is insignificant in evaluating mean-median calculations, where this Court has credited expert testimony asserting that the “range” of what is considered normal for this metric is in the narrow range between zero to four percentage points. Rep. at 172 (FF25); *see League of Women Voters v. Commonwealth*, 178 A.3d 737, 774 (Pa. 2018).

31. Erred in crediting Dr. Barber’s simulations over Dr. Duchin’s simulations, as well as crediting Dr. Barber’s calculations of the Efficiency Gap



metric over other experts, where every other expert that performed the calculation found HB 2146 to be significantly more unfair. *See* Rep. at 176 (FF22). *See Brief in Support*, section III.B.1.a.

32. Erred in concluding that plans which prioritize proportional election outcomes such as “negating a natural geographic disadvantage to achieve proportionality at the expense of traditional redistricting criteria” will *per se* violate the Pennsylvania Constitution’s Free and Equal Elections Clause, where proportionality is an important proxy for measuring partisan skew or unfairness as it relates to the desires of the state’s voters. Rep. at 177. *See Brief in Support*, section III.B.1.b.

33. Erred in concluding that proportionality is not a “goal of redistricting” and thus “any plan that attempts to achieve proportionality . . . must be disregarded.” Rep. at 178 (CL1; FF1). *See Brief in Support*, section III.B.1.b.

34. Even accepting the erroneous conclusion that a plan that results in proportional election outcomes is *per se* a violation of the Free and Equal Elections Clause of the state’s constitution, erred in failing to find that, pursuant to the opinion of Dr. Barber, which the Special Master has erroneously chosen to credit, HB 2146 shows a Democratic skew of 9 Democrat-leaning districts (*see infra* ¶ 40), and thus would also be a *per se* violation of the Pennsylvania Constitution. Rep. at 177; *see also* Barber Rebuttal Rep. at 15 (Jan. 26, 2022).



#### **D. Least Change**

35. Erred in concluding that the least-change approach is of “limited utility,” and that utilizing the least-change approach is different from evaluating redistricting plans against traditional criteria, where comparison to the 2018 Remedial Plan is a way to measure the degree to which the Carter Plan mirrors a map previously drawn by this Court that maximized adherence to every redistricting principle and where preservation of prior districts is a redistricting principle specifically enumerated by this Court. Rep. at 184 (CL3-4). *See Brief in Support*, section III.B.2.

36. Erred in concluding that the *Carter* Petitioners were proposing reliance on the least-change doctrine as a way to require, or sanction, a court to defer to its own prior redistricting map, where the least-change doctrine is merely crediting the most recent constitutional map, regardless of whether it was enacted by a legislature or drawn by a court. *See* Rep. at 187 (CL11). *See Brief in Support*, section III.B.2.

37. Erred in finding that the *Carter* Petitioners elevated a “subordinate factor into a dominate one” and thus “violate[d] the Free and Equal Elections Clause as a matter of law,” where the evidence showed that the Carter Plan sufficiently meets every one of the traditional *and* historical redistricting factors, that Dr. Rodden drew the Carter Plan with particular attention to those redistricting criteria, and that the least-change analysis is also a way to measure the degree to which the Carter



Plan adheres to the redistricting principles as established by this Court just four years ago. Rep. at 187 (FF10). *See Brief in Support*, section II.B.

38. Erred in finding that Dr. Rodden’s calculations of retained population share was not useful because “Dr. Rodden does not explain the extent to which the percentages of retained population share is either acceptable or so disparate so as to justify the elimination of any of the other plans or conversely to prioritize the Carter Plan based on this criterion,” where Dr. Rodden expressly offered the calculations as a way to compare which of the Submitted Plans retained the highest population distribution from the 2018 Remedial Plan, and thus least disrupts the existing districts. Rep. at 185 (FF7); Rodden Rebuttal Rep. at 1–2 (Jan. 26, 2022).

## **V. HB 2146**

39. Erred in concluding that the HB 2146 Plan should be accorded any particular deference because it passed the legislative branch, given that it was vetoed by Governor Wolf and the veto has not been overridden. Rep. at 215–16 ¶¶ 96–97. *See Brief in Support*, section III.C.

40. Erred in finding that the HB 2146 Plan predicted a result of 9 Democratic-leaning seats and 8 Republican-leaning seats, and is thus more favorable to Democrats, when in fact HB 2146 is more favorable to Republicans and will likely result in the election of at least 9 Republicans. *See* Rep. at 211 ¶ 78; Rodden Rebuttal Rep. at 9–11 (Jan. 26, 2022).



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