No. 21-1509

In the Supreme Court of the United States

RYAN COSTELLO, PETITIONER,

v.

CAROL ANN CARTER, ET AL., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR CARTER RESPONDENTS IN OPPOSITION

ABHA KHANNA
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Ave.
Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

LALITHA D. MADDURI
CHRISTINA A. FORD
JYOTI JASRASARIA
ELIAS LAW GROUP LLP
10 G St. N.E.
Suite 600
Washington, DC 20002
(202) 968-4490

Counsel for Carter Respondents

QUESTIONS PRESENTED

1. Was the Pennsylvania Supreme Court obligated to order at-large congressional elections under 2 U.S.C. § 2a(c)(5) after the political process failed to produce a map, even though it was able to remedy the impasse without moving the primary election date?

2. If the Pennsylvania Supreme Court was not obligated to order at-large congressional elections, was it required to defer to a redistricting plan that had been vetoed by the Governor?

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INTRODUCTION

Petitioner asks this Court to resolve two questions about Pennsylvania's 2022 congressional redistricting that were never addressed by the court below, run contrary to Petitioner's own positions in the state court litigation, and are outside this Court's jurisdiction. What is more, Petitioner's underlying merits arguments conspicuously ignore the substance and text of this Court's precedent and state courts' historical practice. The petition ultimately amounts to an after-the-fact political grievance with the congressional map that the Pennsylvania Supreme Court adopted, which hardly warrants this Court's review.

Six months ago, the Pennsylvania Supreme Court adopted the current congressional map after the political process failed to produce a map. The players in that process—the leaders of both caucuses in both houses of the General Assembly and the Governor—took no issue with the state court's actions. Nor did Petitioner himself. During their participation in the state court litigation, all parties acknowledged—and, in Petitioner's case, advocated—that the Pennsylvania Supreme Court could both adopt a congressional map of its choosing and modify the administrative election calendar to facilitate the map's implementation.

It is only now—and alone—that Petitioner, former U.S. Representative Ryan Costello, introduces the question of whether the Pennsylvania Supreme Court should have ordered at-large elections in 2022 and, if not, whether it should have deferred to a redistricting plan that had been vetoed by the Governor. In doing so, he asserts an Elections Clause theory that is incoherent at best. On one hand, he

admits that the Elections Clause and 2 U.S.C. § 2c authorized the Pennsylvania Supreme Court to adopt a congressional plan after the political process failed to produce one. Pet. 30. On the other, he contends that *Branch v. Smith*, 538 U.S. 254 (2003), required the Pennsylvania Supreme Court to defer to a specific map: the redistricting plan that had been vetoed by the Governor, which was the very map that led to impasse in the first place. Pet. 30. Petitioner's arguments have no basis in law and misread the text of *Branch* itself.

In any event, this Court lacks jurisdiction to consider Petitioner's questions. Petitioner does not have standing to bring this appeal. Additionally, whether the Pennsylvania Supreme Court should have ordered at-large elections for this election cycle is both moot and hypothetical. And whether the Pennsylvania Supreme Court correctly followed state "policies and preferences" is "necessarily" a matter of state law, *Branch*, 538 U.S. at 274 (plurality opinion), which this Court cannot decide.

Even without these jurisdictional barriers, prudential concerns militate against considering questions that rarely arise and are fundamentally about error correction. They especially disfavor cases like this one, where this Court would be deciding the issues in the first instance, where there is no division among courts on the questions presented, and where Petitioner previously advocated for much of the very relief he now challenges.

Finally, this Court should deny review because the decision below was correct. The Pennsylvania Supreme Court acted in accordance with this Court's precedent, Pennsylvania law, and the longstanding practice of state courts across the country. Petitioner's preferred outcome would invite this Court to mandate

at-large congressional elections despite Congress having enacted a single-member congressional district requirement in 1967, *see* 2 U.S.C. § 2c, and would defy well-established precedent respecting a governor's role in the lawmaking process. This Court should deny certiorari.

STATEMENT

A. Commonwealth Court Proceedings

In mid-December 2021, after months of legislative inaction on congressional redistricting, a group of Pennsylvania voters residing in overpopulated districts filed suit in Pennsylvania's Commonwealth Court, alleging malapportionment among the state's congressional districts. Those voters—the Carter Respondents[1]—asked the Commonwealth Court to adopt a new, constitutional congressional apportionment plan in the likely event of an impasse between the state's political branches. Such a plan needed to account for Pennsylvania's population changes over the past decade, which notably resulted in Pennsylvania's loss of a congressional district following the 2020 Census. The Carter Respondents thus brought their lawsuit in part under 2 U.S.C. § 2c, which provides that a state should have "a number of [congressional] districts equal to the number of Representatives to which such State is so entitled."

Days after the Carter Respondents filed suit, the Commonwealth Court announced that it would proceed to adopt a new congressional plan if the General Assembly and the Governor failed to enact a congressional reapportionment plan by January 30,

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[1] The Carter Respondents are 16 individual Pennsylvania voters.

2022. Shortly thereafter, the Court permitted interested individuals to intervene, including the Republican and Democratic leadership of the Pennsylvania General Assembly, Governor Wolf, and current and former members of the state's congressional delegation. Among those intervenors was Petitioner, Ryan Costello, who previously represented Pennsylvania's Sixth Congressional District.[2] Toth Carter App. 79a.[3]

In their initial briefing in the state court proceedings, the majority leaders of the Pennsylvania House and Senate (hereinafter the "Legislative Leaders") explained that they did not "contest" that "[w]hen . . . the legislature is unable or chooses not to act, it becomes the judiciary's role to determine the appropriate redistricting plan," Toth Carter App. 52a (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018)); they interposed no objection to "the commencement of a judicial redistricting process," Toth Carter App.54-55a; and they endorsed the state courts' power to modify the election schedule, Toth Carter App. 6-7a. The Legislative Leaders also explicitly agreed that the case raised no Elections Clause issues because "it is settled law that state courts have authority to declare and remedy

[2] Petitioner intervened in the Pennsylvania state court action as part of a group of former congressmen, but he alone filed this Petition. Notably, although the Petition makes two passing references to a "Mr. Grove," Pet. iii, 8, no Mr. Grove is listed among the parties to the proceeding, *id.* at ii, or was involved in the Pennsylvania state court litigation.

[3] References to the "Toth Carter App." are to the Carter Respondents' Appendix, filed on March 3, 2022, in *Toth v. Chapman,* No. 21A457, https://www.supremecourt.gov/DocketPDF/21/21A457/217673/20220303170407861_Toth%20Appendix.pdf.

violations of the U.S. Constitution, even with respect to laws governing congressional elections." Toth Carter App. 52a n.2 (citing *Growe v. Emison*, 507 U.S. 25, 32–36 (1993)).

In total, the parties and *amici*, including Petitioner, submitted 14 different proposed maps to the Commonwealth Court for consideration. In his submission supporting his proposed maps, Petitioner acknowledged that, "in light of the continued legislative impasse, it has fallen on this Court to select an appropriate congressional redistricting plan." Carter App. 2a. Petitioner encouraged the Commonwealth Court to select from two congressional plans of his own making, then known as the "Reschenthaler" Plans. Carter App. 3a. At no point did Petitioner argue the court should adopt the General Assembly's proposed plan. Carter App. 3a, 8a. And no party suggested the court should order at-large elections.

Petitioner also encouraged the Commonwealth Court to "enjoin further use and enforcement of the Election Code's provisions relating to the timeline for circulating, filing, and objecting to nomination petitions and immediately adopt the timetable proposed by [Petitioner] for the 2022 General Primary." Carter App. 3a. Petitioner noted that the Pennsylvania Supreme Court had previously modified administrative election deadlines just a few years ago and argued Pennsylvania's judiciary should do so again. Carter App. 36-39a. Petitioner specifically recommended that the Court not move the May 17 primary date but shift the dates for filing and circulating nominating petitions from February 15, the original date, to February 29. Carter App. 38-39a. He also proposed corresponding shifts to the rest of the election calendar. Carter App. 38a n.12. Petitioner

explained that briefly delaying the dates for filing and circulating nominating petitions would "give the Court additional time to carefully review, consider, and select a new congressional redistricting plan." Carter App. 39a. Neither Petitioner nor any other party raised Elections Clause concerns about modifying pre-election deadlines.

After receiving all proposed congressional plans, the Commonwealth Court held a two-day evidentiary hearing on the proposed maps, restating at the start that it would adopt a new congressional plan if the General Assembly and Governor failed to enact one by January 30. Costello App. 177a. At no time in those hearings did any party raise Elections Clause concerns or argue that the court should order at-large elections.

B. Pennsylvania Supreme Court Proceedings

Governor Wolf vetoed the General Assembly's proposed map on January 26, and the Commonwealth Court's January 30 deadline passed without a duly enacted map in place. Costello App. 177a. A few days later, the Pennsylvania Supreme Court exercised extraordinary jurisdiction over the ongoing litigation, designating the Commonwealth Court judge who had been presiding over the proceedings in the lower court as Special Master.

Shortly thereafter, the Special Master released her report and recommendation to the Pennsylvania Supreme Court. The Special Master recommended that (1) the Pennsylvania Supreme Court adopt the General Assembly's proposed plan, HB 2146, which had been vetoed by Governor Wolf, and (2) the Pennsylvania Supreme Court adopt "[Petitioner's] proposed revisions to the 2022 General Primary

Election calendar," which would give candidates 15 days to circulate petitions. Costello App. 389a, 394a. The Pennsylvania Supreme Court invited all parties to brief any exceptions to the Special Master's recommendations.[4]

Thirteen parties submitted briefing and presented oral argument to the Pennsylvania Supreme Court. In his brief to the Pennsylvania Supreme Court, Petitioner characterized the Special Master's recommendation to adopt the General Assembly's Plan as error, arguing that the Pennsylvania Supreme Court should adopt one of his plans instead. Carter App. 43a (Petitioner explaining that "the Special Master also erred in her ultimate recommendation that this Court should select HB 2146, rather than [the] Reschenthaler [Plans]"). Petitioner did not argue that the Pennsylvania Supreme Court should order at-large elections—no party did. Nor did Petitioner take exception with the Special Master's recommendation that the Pennsylvania Supreme Court modify the election calendar slightly, just as Petitioner had recommended. For their part, the Legislative Leaders recommended that the Pennsylvania Supreme Court adopt the Special Master's Report "in its entirety," which would have included its recommendation to modify the election calendar. Toth Carter App. 109a.

On February 23, the Pennsylvania Supreme Court ordered the adoption of the Carter Respondents'

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[4] One week before oral argument and six weeks after the Commonwealth Court's deadline for intervention, Lieutenant Governor candidate Teddy Daniels filed an emergency application to intervene, in which he raised some of the arguments Petitioner makes here. The Pennsylvania Supreme Court denied his application to intervene, and his claims were not briefed or addressed by the court.

proposed plan (the "Carter Plan") and announced that an opinion would follow. Costello App. 148a. In its February 23 order, the Pennsylvania Supreme Court accepted the Special Master's recommendation to modify the dates for circulating petitions without moving the primary date, which Petitioner had proposed. Costello App. 149a. The Pennsylvania Supreme Court provided candidates with more time to circulate petitions than the Special Master had recommended—and even more time than the statute itself provided. Costello App. 149-150a; *see* 25 P.S. § 2868.

In its later opinion explaining its reasons for selecting the Carter Plan, the Pennsylvania Supreme Court explained that the Special Master's deference to the redistricting plan that had been vetoed by the Governor was "offensive to the separation-of-powers" in the Commonwealth, which envisioned a lawmaking role for the Governor. Costello App. 25-27a. The Pennsylvania Supreme Court thus declined to automatically defer to HB 2146 without evaluating it, alongside the other submitted plans, for compliance with Pennsylvania's traditional and historical redistricting criteria. Costello App. 28a. After evaluating all of the proposed plans against these criteria, the Pennsylvania Supreme Court selected the Carter Plan, which used Pennsylvania's previous congressional plan as its starting point. Costello App. 30-31a. The Pennsylvania Supreme Court found the Carter Plan was "one of the best in terms of keeping counties whole," Costello App. 41a, "meets or exceeds the other submitted plans in terms of its adherence to the traditional core criteria," Costello App. 42a, best preserved the cores of prior districts, Costello App. 43-44a, and was "superior or comparable to the other

maps in regard to partisan fairness." Costello App. 47a.[5]

Shortly after the Pennsylvania Supreme Court released its order selecting the Carter Plan, six Pennsylvania citizens, none of whom were parties below, sought emergency relief from this Court, raising Elections Clause claims and asking this Court to order Pennsylvania to conduct its congressional elections on an at-large basis. *See* Emergency Appl. for Writ of Inj., *Toth v. Chapman*, No. 21A457 (Feb. 28, 2022). This Court denied the application without dissent. *See Toth v. Chapman*, 142 S. Ct. 1355 (2022).

Petitioner now argues that the Pennsylvania Supreme Court erred in several ways: (1) by modifying the election calendar, just as Petitioner requested, (2) by not ordering at-large elections, which no party requested, and (3) by not selecting the General Assembly's Plan, which Petitioner himself asked the Pennsylvania Supreme Court not to do.

REASONS TO DENY THE PETITION

Certiorari should be denied for numerous reasons. First, this Court lacks jurisdiction to hear the petition. Second, Petitioner does not provide compelling reasons for this Court to exercise its discretionary review. Third, this case is an exceedingly poor vehicle to decide the questions presented given the record below. Finally, the Pennsylvania Supreme Court correctly followed this Court's longstanding precedent and applied its own state law in selecting the plan it did.

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[5] The Carter Plan's mapmaker, Dr. Jonathan Rodden, also testified that he did not consider racial data or partisan performance when drawing the map. Costello App. 32a. No other party made their mapmaker available for examination during the Special Master's hearing.

A. This Court lacks jurisdiction to hear the petition.

Petitioner neither has standing nor presents issues this Court can adjudicate.

1. Petitioner lacks standing to press this appeal.

This Court has held that Article III standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997). This rule applies to intervenors, who "cannot step into the shoes of the original party [to appeal] unless the intervenor independently 'fulfills the requirements of Article III.'" *Id.* at 65 (citing *Diamond v. Charles*, 476 U.S. 54, 68 (1986)). "[I]t is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013).

Petitioner plainly lacks standing to press this appeal. In his intervention at the Commonwealth Court, Petitioner identified himself as one of several former U.S. Representatives who had "an interest in advocating on behalf of the communities that they formerly served" in the redistricting process, explaining that he hoped to "provide the Court with critical information regarding the communities and boundaries in [his prior] district." Toth Carter App. 92a. Petitioner also broadly alleged malapportionment in Pennsylvania's congressional districts, although Petitioner did not specify his own congressional district, let alone allege that he resides in an overpopulated district. Toth Carter App. 78a-79a n.1 & 81a.

Neither of these interests is sufficient for standing on appeal. Petitioner's first interest in providing input to Pennsylvania courts has already been satisfied and represents no more than a "keen interest in the issue," which is insufficient for standing. *Hollingsworth*, 570 U.S. at 700. His second general interest in remedying malapportionment in Pennsylvania's congressional districts is also insufficient to support standing. Only voters who live in overpopulated (and therefore underrepresented) districts have standing to bring malapportionment claims. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1930–32 (2018) (reiterating that malapportionment injuries are "district[-]specific" and that plaintiffs cannot allege injury from the statewide plan as a whole). Moreover, the Carter Plan, which was drawn using 2020 Census data, remedies any unconstitutional malapportionment in the preceding plan. Petitioner does not contend otherwise.

On appeal, Petitioner does not attempt to explain his basis for standing. He instead alleges a broad violation of the Elections Clause, which he claims results from the Pennsylvania Supreme Court's modification of the election calendar, failure to order at-large elections, and failure to adopt the General Assembly's vetoed redistricting plan.

But Petitioner suffers no injury-in-fact from these alleged Elections Clause violations. It is well settled that asserting a right "to have the Government act in accordance with law" does not confer standing. *Allen v. Wright*, 468 U.S. 737, 754 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27 (2014); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("[U]nder Article III, an injury in law is not an injury in fact. Only those plaintiffs

who have been concretely harmed by a defendant's . . . violation may sue . . . over that violation in federal court.").

Consistent with this precedent, this Court has held that private individuals do not typically have standing to advance Elections Clause claims. *See Lance v. Coffman*, 549 U.S. 437 (2007). In *Lance*, private citizens challenged the Colorado Supreme Court's imposition of a redistricting plan, which they alleged violated the Elections Clause. After describing this Court's "lengthy" jurisprudence holding that federal courts should not "serve as a forum for generalized grievances," *id.* at 439, this Court articulated the "obvious" problem with the plaintiffs' standing: "The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is *precisely the kind of undifferentiated, generalized grievance* about the conduct of government that we have refused to countenance in the past." *Id.* at 442 (emphasis added).

Petitioner does not attempt to distinguish *Lance* from the present case, nor do his circumstances merit such a distinction. Petitioner was not a candidate for re-election this year, and thus the Pennsylvania Supreme Court's modification of nomination petition deadlines could not have affected him. Indeed, Petitioner does not even attempt to explain how the slight modification of election dates affected or injured *anyone*. To the extent Petitioner believes he was entitled to vote in at-large elections in Pennsylvania this year, such a deprivation is not a cognizable injury because it would be felt by all Pennsylvania voters equally. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (holding plaintiff lacked standing where plaintiff "suffers in some indefinite way in common with people generally"

(quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923))). Nor was Petitioner entitled to any particular redistricting plan; this Court has already made clear it is "not responsible for vindicating generalized partisan preferences." *Gill*, 138 S. Ct. at 1933.

Finally, even if Petitioner had suffered an injury-in-fact from the Pennsylvania Supreme Court's adoption of the Carter Plan, prudential standing would bar his claim. Prudential limitations require a party to "assert his own legal rights and interests," rather than "rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). But Petitioner's claims rest entirely on the alleged usurpation of institutional rights held by the Pennsylvania General Assembly, which has not appealed the judgment of the Pennsylvania Supreme Court, is not before the Court, and whose interests cannot be advanced by individuals lacking authority to act on its behalf. Notably, neither the Legislative Leaders, nor the minority caucus, nor the Governor—all of whom were parties to the state court litigation—took issue with the court's authority to change certain election-related deadlines or sought at-large elections. *See supra* Statement. This petition thus materially differs from the recently-granted petition in *Moore v. Harper,* No. 21-1271, in which the leadership of the North Carolina General Assembly itself appealed the judgment of the North Carolina Supreme Court.[6]

[6] Given that *Moore* was brought by substantially different parties, presented different questions, and involved a map altered in a different posture, there is no reason for this Court to hold the present petition until a decision in *Moore*.

Because Petitioner lacks standing to appeal, his petition must be denied.

2. The petition does not present issues this Court can adjudicate.

Petitioner presents two separate issues, each of which he alleges is an independent violation of "*Branch*'s interpretation of section 2c." Pet. 30. The first is whether the Pennsylvania Supreme Court's slight shifting of certain pre-primary election deadlines "disrupt[ed] the election process" such that it should have ordered at-large elections. *Id.* at 30-31. The second is whether, notwithstanding that alleged error, *Branch* required the Pennsylvania Supreme Court to adopt the General Assembly's vetoed map proposal. *Id.* at 31-32. This Court does not have jurisdiction to decide either issue.

a. The petition's first issue is moot, and deciding it would require this Court to enter an advisory opinion.

Petitioner's first issue is undeniably moot. An issue becomes moot when it is "no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). That is precisely the situation here because the remedy Petitioner seeks—requiring the Pennsylvania Supreme Court "to implement at-large elections under section 2a(c)(5) rather than impose a court-selected map under section 2c," Pet. 30—is no longer available. As Petitioner concedes, the 2022 election cycle is already proceeding under the single-member district Carter Plan. *Id.* at 21 ("It is too late for this Court to vacate the imposition of the Carter Map for the 2022 election cycle."). The Court "cannot turn back the clock and create a world in which" this

year's congressional elections in Pennsylvania proceed at-large. *Wood v. Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020) (citing *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015)). Nor does Petitioner claim that future Pennsylvania congressional elections should be held at-large, and for good reason—there is already a single-member district plan in place, and Petitioner does not and could not contend that implementing a single-member district plan would necessarily disrupt elections in 2024 and beyond. *See generally* Pet. 30-32.

Any concern that Pennsylvania's congressional elections should have been conducted at-large is thus simply "an abstract dispute about the law." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). Correspondingly, asking the Court to pronounce rules of constitutional interpretation for a hypothetical legislative impasse in a later decade would amount to little more than an "advisory opinion[]" that is barred by Article III. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam); *see TransUnion LLC*, 141 S. Ct. at 2203 (reaffirming that "federal courts do not issue advisory opinions").

Moreover, the scenario presented is far from the "exceptional situation[]," *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), that is "capable of repetition, yet evading review," *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007), and thus is not exempt from the mootness doctrine. First, the action is not "in its duration too short to be fully litigated prior to cessation or expiration." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). The underlying state court litigation lasted for months, *see supra* Statement, and this Court in fact considered and rejected an emergency application seeking similar relief earlier this year, well in advance of Pennsylvania's May 17 primary. *Toth*, 142 S. Ct. at

1355. Second, there is no "reasonable expectation that the same complaining party will be subject to the same action again." *Davis*, 554 U.S. at 735. For Petitioner to face the same circumstances again—no sooner than a decade from now—the following would have to occur: Pennsylvania's population this decade would have to grow at a sufficiently slower rate than the rest of the United States such that Pennsylvania would lose a congressional seat after the 2030 decennial census; Pennsylvania's political branches would have to fail to pass a congressional map for use in the 2032 election; and the Pennsylvania judiciary would have to impose a congressional map too late to keep the entire election calendar intact. At best, the possibility of recurrence is "no more than conjecture." *Lyons*, 461 U.S. at 108–09.

In short, the issue is moot. And "[w]here one of the several issues presented becomes moot, the remaining live issues [must] supply the constitutional requirement of a case or controversy." *McCormack*, 395 U.S. at 497; *id.* at 496 n.8 ("Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has [] considered [only] the remaining requests."). But here, the remaining issue fares no better at preserving this Court's jurisdiction.

b. There is no live federal issue for this Court to decide.

Congress has limited this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State . . . where," in relevant part, "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a). Here, there is no federal question for this Court to decide—except for

one which is obviously moot and hypothetical, *see supra* Argument A.2.a—because, while Petitioner tries to disguise his gripe with the Carter Plan as a federal violation, he advances nothing more than disagreement over whether the Pennsylvania Supreme Court correctly applied the "policies and preferences of the State" in choosing a map. Pet. 31-32.

Indeed, Petitioner concedes that "the problem is *not* that the Supreme Court of Pennsylvania chose to impose a congressional map in response to a legislative impasse." *Id.* at 30. Rather, Petitioner asserts that "[t]he problem is that the Supreme Court of Pennsylvania's actions were not authorized by *Branch*'s interpretation of section 2c." *Id.* But *Branch* simply instructs that a court adopting a congressional plan should "redistrict[] in the manner provided by state law." 538 U.S. at 274 (cleaned up); *see also id.* (explaining that following state "policies and preferences" means to redistrict "in the manner provided by state law"). And because the Pennsylvania Supreme Court is the final arbiter of Pennsylvania law, *see Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law."); *Florida v. Powell*, 559 U.S. 50, 56 (2010) (similar), this Court lacks jurisdiction to second-guess that court's interpretation of state law. *See, e.g.*, *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) (explaining that this Court is "bound to accept the interpretation of [state] law by the highest court of the State").

To the extent Petitioner argues that the Pennsylvania Supreme Court misapplied its own state "policies and preferences" as defined by *Branch*, and that a violation of *Branch* is a violation of the

Elections Clause such that the Pennsylvania Supreme Court's "adherence to state policy . . . detract[s] from the requirements of the Federal Constitution," that reasoning fails. Pet. 31 (quoting *Branch*, 538 U.S. at 275). Irrespective of Petitioner's misreading of *Branch*, explained further below, *see infra* Argument D.2*, Branch* makes clear that it is not attempting to define state "policies and preferences." Rather, *Branch* requires "deferr[ing] to the State's 'policies and preferences' for redistricting" to respect "state sovereignty," recognizing that "instruct[ing] state officials on how to conform their conduct to state law" could create a conflict with *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). *Branch*, 538 U.S. at 278 n.**.

Ultimately, Petitioner's reasoning is circular. He admits that the underlying question is whether the Pennsylvania Supreme Court followed *Branch*—in which the underlying question is whether the Pennsylvania Supreme Court followed its own state policies and preferences. Thus, the only question Petitioner presents is whether the Pennsylvania Supreme Court followed Pennsylvania state law, policies, and preferences—a question on which *that court* is the ultimate decider. There is no remaining dispute for this Court to resolve.

B. Petitioner has not demonstrated a compelling reason to grant certiorari.

Even if this Court had jurisdiction, "presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction." *Hammerstein v. Super. Ct. of Cal.*, 341 U.S. 491, 492 (1951). Under this Court's rules, "[a] petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Such a compelling reason might exist where a state court of

last resort has decided an "important" federal question that either (1) "has not been, but should be, settled by this Court" or (2) conflicts with a decision of a state supreme court or federal appellate court, or this Court. *Id.* Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* As described below, the petition does not present compelling reasons of the character that merit certiorari review.

1. Petitioner fundamentally seeks error correction in the absence of any error.

Petitioner concedes that his concern with the Pennsylvania Supreme Court's opinion is simply that it failed to follow this Court's existing precedent. Pet. 30 ("The problem is that the Supreme Court of Pennsylvania's actions were not authorized by *Branch*'s interpretation of section 2c . . . ."). In other words, Petitioner's aim is for this Court to correct what he perceives to be the state court's error of law. But this Court rarely indulges such requests, and it especially should not do so here, where there is no error to correct and where any error correction would necessarily involve interpreting state law.

Precisely as *Branch* sets forth, the Pennsylvania Supreme Court adopted a congressional map "in the manner provided by [state] law," by "follow[ing] the 'policies and preferences of the State.'" 538 U.S. at 274 (first alteration in original) (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)). For example, the Pennsylvania Supreme Court chose a map that adhered to "factors that are deeply rooted in the organic law of our Commonwealth" and that are codified, for state legislative redistricting, in the

Pennsylvania Constitution. *League of Women Voters*, 178 A.3d at 816, *cited in* Costello App. 5-6a (listing the state's "traditional core districting criteria"). The Pennsylvania Supreme Court also ensured that the map it adopted "does not violate Pennsylvania's Free and Equal Elections Clause . . . and complies with the [federal] Voting Rights Act, 52 U.S.C. § 10301." Costello App. 6a; *see Branch*, 538 U.S. at 275 ("[F]ederal statutory commands . . . are appropriately regarded . . . as a part of the state election law."). Just as importantly, the Pennsylvania Supreme Court "comport[ed] with this Commonwealth's constitutional precepts" in *declining* to select the map that Petitioner now prefers. Costello App. 27a.

In any event, even if the Pennsylvania Supreme Court *did* err in applying *Branch*, "the misapplication of a properly stated rule of law" rarely warrants this Court's certiorari review. U.S. Sup. Ct. R. 10. Moreover, assessing that alleged misapplication would expressly involve deciding whether the Pennsylvania Supreme Court "follow[ed] the 'policies and preferences of the State.'" *Branch*, 538 U.S. at 274. That, again, is a question of state law, on which this Court must defer to the Pennsylvania Supreme Court. *See supra* Argument A.2.b.

2. Rather than presenting important federal questions that this Court should decide, the petition asks questions that rarely arise.

Petitioner's questions are inextricably bound to the specific facts of this case and are unlikely to arise again. As an initial matter, state courts draw congressional districting plans in the first instance only when the state legislative process fails to produce a map following the decennial census. *See Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 473 (Wis.

2021); *Wattson v. Simon*, 970 N.W.2d 42 (Minn. 2022). But Petitioner's questions do not even apply to the majority of those scenarios—they apply only when a state has lost at least one congressional seat after the decennial census *and* its state legislative process fails to produce a map. In the redistricting cycle following the 2020 census, only one state—Pennsylvania—met both of these conditions.

To the extent Petitioner's questions attempt to reach scenarios in which a state's congressional delegation size stays the same or increases—where 2 U.S.C. § 2a(c)(1) or 2a(c)(2) would apply, *see* Pet. 27—a plurality of this Court has already explained that "paragraphs (1) through (4) of § 2a(c) have become (because of post-enactment decisions of this Court) in virtually all situations plainly unconstitutional." *Branch*, 538 U.S. at 273. Thus, even setting aside that these issues are not before the Court, there is no reason to consider whether §§ 2a(c)(1) and 2a(c)(2) limit state courts' remedial discretion as Petitioner suggests.

3. There is no division of authority over Petitioner's questions.

Petitioner does not raise any question on which there is a division of authority, nor does Petitioner contend otherwise. Petitioner relies solely on his own interpretations of *Branch* in arguing that state courts should order at-large elections and defer to legislative proposals—interpretations that seem to be his alone, as he does not cite a single authority in support.

C. This petition is a poor vehicle to decide the issues presented.

Even if this Court had compelling reasons to entertain Petitioner's questions in the abstract, Petitioner's conflicting positions in this case before the

state court and this Court have resulted in both waiver and an undeveloped record of the issues he now asks this Court to decide in the first instance.

1. Petitioner should be estopped from claiming error over rulings he invited the Pennsylvania Supreme Court to make.

As this Court has explained, invited error is a form of waiver. *See Johnson v. United States*, 318 U.S. 189, 199–201 (1943). When a lower court "follow[s] the course which [Petitioner] himself helped to chart and in which he acquiesced," a challenge to the lower court's decision is "plainly waived." *Id.* at 201; s*ee also* 14 Cyc. of Fed. Proc. § 67:12 (3d ed.) ("[A]n appellant will not ordinarily be permitted to complain of an alleged error that she invited or that the court committed at her instance or inducement."). The purpose of the invited error doctrine is "to protect the integrity of the judicial process" and to prevent litigants from playing "fast and loose with the courts." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (citations omitted). Because Petitioner invited the Pennsylvania Supreme Court to make several of the rulings which he now claims were in error, Petitioner has waived any challenge he might otherwise have raised.

First, while Petitioner now claims it was a violation of the Elections Clause for the Pennsylvania Supreme Court to modify the primary election calendar, Petitioner specifically advocated for such a modification. *Compare* Carter App. 3a, 38a (Petitioner encouraging court to "enjoin further use and enforcement of the Election Code's provisions relating to the timeline for circulating, filing, and objecting to nomination petitions and immediately adopt the timetable proposed by [Petitioner] for the 2022

General Primary"), *with* Pet. 1-2 (Petitioner arguing the Pennsylvania Supreme Court "flagrantly violat[ed] the Elections Clause" by "order[ing] state election officials to disregard the General Primary Calendar enacted by the Pennsylvania Legislature in favor of a court-preferred schedule"). Moreover, after the Commonwealth Court "recommend[ed] for adoption by the Supreme Court *the [Petitioner's] proposed revisions* to the 2022 General Primary Election Calendar" Costello App. 394a (emphasis added), the Pennsylvania Supreme Court gave the parties an opportunity to take exceptions to that recommendation; neither Petitioner nor any other party objected to the Court's authority to modify administrative election-related deadlines. *See supra* Statement B.[7]

Where Petitioner not only acquiesced in the modification of election deadlines, but specifically requested it, Petitioner cannot now complain that the Court did exactly as Petitioner asked. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (explaining "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested").

Second, while Petitioner now claims it was error for the Pennsylvania Supreme Court to adopt a plan other than that proposed by the General Assembly, he previously argued *against* adoption of that plan. *Compare* Carter App. 43a (Petitioner

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[7] Petitioner claims "no litigant had asked" for modified election deadlines. Pet. 17. This is false—Petitioner himself asked the Commonwealth Court to modify pre-election deadlines. *See supra* Statement.

arguing, "the Special Master also erred in her ultimate recommendation that this Court should select HB 2146"), *with* Pet. 31 (Petitioner arguing "[t]he Supreme Court of Pennsylvania disregarded [*Branch v. Smith*] when it rejected the HB 2146 map that had been proposed by the state legislature") (cleaned up). Throughout the litigation, Petitioner encouraged the state courts to reject the General Assembly's plan; he cannot now complain that the Pennsylvania Supreme Court did exactly that.

2. The Pennsylvania Supreme Court did not have an adequate opportunity to consider or rule upon the issues Petitioner now raises.

This Court has explained that it "will not decide questions not raised or litigated in the lower courts." *Kibbe*, 480 U.S. at 259. This approach makes sense: this Court does not ordinarily decide issues in the first instance but instead sits "as a court of review." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

In addition to the error alleged above, Petitioner also now claims it was error for the Pennsylvania Supreme Court not to order at-large elections after it imposed a modified election calendar. Pet. 30. But no party raised this argument to the Pennsylvania Supreme Court—not Petitioner, not the Legislative Leaders, and not any of the eleven other parties. Instead, each party advocated for the Court to select its own, 17-district congressional plan. For this reason, the Pennsylvania Supreme Court reasonably did not address the issue, meaning this Court would need to consider the issue in the first instance. It should not do so.

D. The decision below was correct.

Finally, this Court should decline to grant the Petition because Petitioner's arguments—that the Pennsylvania Supreme Court should have (1) ordered at-large congressional elections and (2) adopted the General Assembly's vetoed map—conflict with federal statutes and this Court's precedent.

1. The Pennsylvania Supreme Court was correct to order a single-member congressional plan.

Pursuant to its Elections Clause powers, Congress enacted 2 U.S.C. § 2c, which requires that congressional representatives be elected from single-member districts. U.S. Const. art. I, § 4 ("Congress may at any time by Law make or alter [election] Regulations."). This Court has explained that § 2c authorizes both state and federal courts to "remedy[] a failure" by the state legislature "to redistrict constitutionally" and "embraces action by state and federal courts when the prescribed legislative action has not been forthcoming." *Branch*, 538 U.S. at 270, 272. Petitioner does not dispute state courts' authority in this regard. *See, e.g.*, Pet. 26 ("[I]t does *not* violate the Elections Clause for the state judiciary to enforce section 2c."). Although § 2a(c)(5) provides that a state's representatives "shall be elected from the State at large" when a state loses one or more congressional districts after a decennial census and has not been "redistricted in the manner provided by the law thereof," that provision provides a fallback scheme to be used only as a last resort where districting has not occurred. *See Branch*, 538 U.S. at 275.

Petitioner's theory of § 2a(c)(5) advances an argument as baseless as it is untenable. Petitioner's novel theory is that the moment *any* election-related

deadline would have to be modified, no matter how minor or ministerial, courts cannot adopt a congressional plan. Instead, they must order at-large congressional elections that Petitioner concedes would violate § 2c. Pet. 25.

In *Branch*, the Court rejected the interpretation of § 2c and § 2a(c) that Petitioner advances here, holding that § 2a(c) is "inapplicable *unless* the state legislature, and state . . . courts, have all failed to redistrict pursuant to § 2c" and "the election is *so imminent* that no entity competent to complete redistricting" can redistrict. 538 U.S. at 275 (emphasis added).[8] A plurality of the Court explained:

> § 2a(c) cannot be properly applied—neither by a legislature nor a court—as long as it is feasible for [] courts to effect the redistricting mandated by § 2c. So interpreted, § 2a(c) continues to function as it always has, as a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one.

Id. Whatever moment is considered the "eve of a congressional election," when it is "[in]feasible" for any competent entity to redistrict, that occasion never came to pass here. The Pennsylvania Supreme Court adopted a lawful congressional plan three months

[8] Although a four-justice plurality made this statement, three other justices found that § 2a(c)(5) had been impliedly repealed and was inapplicable in any scenario. *Branch*, 538 U.S. at 285 (Stevens, J., concurring). Thus, seven justices found that § 2a(c)(5) could either never apply or could only apply in the extremely limited circumstances described by the *Branch* plurality.

before the state's primary election and almost eight months before the general election; that plan was implemented without incident; and the election process is proceeding under it, in accordance with § 2c and this Court's precedents. Indeed, Pennsylvania's primary election took place, as scheduled, on May 17 under the Carter Plan; §2a(c) thus could not have been "properly applied" because the state court "effect[ed] the redistricting mandated by § 2c." *Id.* Petitioner can hardly contend that the primary was "so imminent" that the state court could not "complete redistricting pursuant to state law . . . without disrupting the election process," where, in fact, the election process is proceeding without disruption. *Id.*

The Pennsylvania Supreme Court issued minor modifications to two pre-election deadlines leading up to the May 17, 2022 primary "[t]o provide for an orderly election process." Costello App. 149a. This change was not only slight, non-disruptive, and months before both the primary and general elections, but essential to crafting a remedy for the underlying violations of state and federal law caused by the political branches' failure to redistrict—a remedy this Court has repeatedly encouraged state courts to formulate. As the Court explained in *Growe*, "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." 507 U.S. at 33 (quotations omitted). The Pennsylvania Supreme Court's authority to adopt a congressional plan necessarily entails the authority to modify election-related administrative deadlines to effectuate that plan—as Petitioner himself recognized and requested,

supra Statement—especially when, as here, doing so did not disrupt the election process.[9]

Moreover, this Court has endorsed federal courts' authority to alter pre-election deadlines and even elections themselves. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("[W]e leave it to [the District Court] in the first instance to determine whether to modify its judgment [as to the state's congressional apportionment plan] and reschedule the [congressional] primary elections for Dallas County or . . . to allow the election to go forward in accordance with the present schedule."). That precedent supports state courts' authority to modify election deadlines as well, especially here, where Petitioner's argument to the contrary is entirely contingent on *Branch*'s reference to "disrupting the election process," which itself applies to "state and federal courts" equally. 538 U.S. at 275.[10]

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[9] Likewise, Pennsylvania's Legislative Leaders expressly endorsed the state courts' power to modify the election schedule in this case, arguing in their pleadings before the Pennsylvania Commonwealth Court that "nominating petition deadlines" have been moved by state courts in the past and "could still be moved in this election cycle." Toth Carter App. 6a (citing *Mellow v. Mitchell*, 607 A.2d 204, 237 (Pa. 1992)). And when the Legislative Leaders argued the Pennsylvania Supreme Court should adopt the Special Master's Report in its entirety, they accordingly endorsed the state election calendar changes the Special Master proposed. *See generally* Toth Carter App. 99-161a; 162-180a.

[10] State courts have routinely made similar election schedule modifications in the redistricting context. *See, e.g.*, Order, *In the Matter of 2022 Legis. Districting of the State*, Misc. Nos. 21, 24, 25, 26, 27 (Md. Feb. 11, 2022) (postponing candidate filing and related deadlines before 2022 primaries); Order, *Harper v. Hall*, No. 413P21 (N.C. Dec. 8, 2021) (postponing 2022 primary filing deadlines and primary election); *Mellow*, 607 A.2d at 237, 244 (revising pre-primary deadlines in similar congressional

Since Congress enacted § 2c in 1967, no state has ever conducted at-large congressional elections. Indeed, Congress enacted § 2c in part to ensure that courts would not order at-large elections. *See Branch*, 538 U.S. at 269 (noting Congress enacted § 2c to stave off the "risk . . . that judges forced to fashion remedies would simply order at-large elections"). And on previous occasions where legislative impasse has followed the loss of one or more congressional seats, courts have adopted single-member congressional district plans.[11] Petitioner has no answer for how his newfound reading of the Elections Clause comports with this legislative history and historical practice. The better reading of § 2a(c)(5) is the *Branch* plurality's reading: that it only comes into play on the eve of an imminent election when no competent entity could possibly pass a lawful map in time. *Id.* at 275. Again, whatever moment that is, the orderly conduct of Pennsylvania's primary and general elections shows that it did not come to pass here.

Worse yet, Petitioner's theory of § 2a(c)(5) would usurp state legislatures' redistricting power. Even when faced with impasse, courts routinely defer to the political process for as long as they can before imposing a remedy. Here, in order to provide maximal time for the political process to produce a map, the Pennsylvania courts declined to act until after the 2021 legislative session adjourned without an enacted map. *See supra* Statement. The Pennsylvania Supreme Court exercised extraordinary jurisdiction

redistricting impasse case "to provide for an orderly election process").

[11] *See, e.g.*, *Favors v. Cuomo*, No. 1:11-CV-05632 (RR)(GEL)(DLI)(RLM), 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002).

only after the Governor vetoed the General Assembly's proposal. *Id.* If Petitioner's theory were adopted, courts would be forced to implement a remedy before political branches had exhausted all opportunities to successfully redistrict, flipping the current balance on its head.

2. The Pennsylvania Supreme Court was not obligated to adopt the General Assembly's proposed map.

Petitioner next argues that the Pennsylvania Supreme Court should have adopted the legislature's vetoed congressional plan. *See, e.g.*, Pet. 31-32. Putting aside that Petitioner argued against adoption of that plan to the Pennsylvania Supreme Court, *see supra* Argument C.1, *Branch* does not require courts to elevate a legislature's failed proposal over a gubernatorial veto. *See* Pet. 31-32. To the contrary, Petitioner's argument that a vetoed bill with no force of law deserves judicial deference—beyond being deeply antidemocratic—has already been rejected by the Court.

When courts redistrict pursuant to § 2c, they must "follow the policies and preferences of the State," which can include a state legislature's plan. *Branch*, 538 U.S. at 274 (quotation omitted). But as the Court has explained, a reapportionment plan that has been vetoed by the governor represents little more than the legislature's "proffered" plan and certainly does not reflect "the State's policy" where, as here, the Governor, has a contrary recommendation. *Sixty Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 197 (1972). Petitioner concedes this, admitting that "redistricting legislation that is vetoed by the governor is not 'prescribed . . . by the Legislature' within the meaning of the Elections Clause." Pet. 10 (citing *Smiley v. Holm*, 285 U.S. 355 (1932)). Indeed,

because the governor is part of the lawmaking process in Pennsylvania, *see Smiley*, 285 U.S. at 372–73, and he vetoed the General Assembly's proposal, that map is definitively *not* Pennsylvania's policy, *see Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Co. 1982) (explaining that vetoed legislative plan "cannot represent current state policy any more than the Governor's proposal"). The Pennsylvania Supreme Court explained as much in its decision. Costello App. 27a (explaining that it "comport[ed] with this Commonwealth's constitutional precepts" in *declining* to defer to the vetoed map and that the Special Master's deference to that map as representing "the will of the people" was "offensive to the separation-of-powers" in the Commonwealth).

The only support Petitioner offers for his theory is a misreading of a single line from *Branch*, in which the Court noted that lower courts adopting remedial redistricting plans should "follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature." 538 U.S. at 274 (quoting *White v. Weiser*, 412 U.S. at 795). But this sentence cannot bear the weight Petitioner gives it. As an initial matter, the plain language of this passage reveals Petitioner's misreading of it. Petitioner's selective emphasis on "plans proposed by the state legislature" ignores that a state's "policies and preferences" can arise from multiple sources. If "or" has meaning, *see U.S. v. Woods*, 571 U.S. 31, 45–46 (2013) ("[Or's] ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings" (quotation and citation omitted)), which of course it must, *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) ("If possible, every word . . .

is to be given effect."), then the Pennsylvania Supreme Court's adoption of a map based on Pennsylvania's "statutory and constitutional provisions"—precisely what it did here—fits neatly within *Branch*'s holding.

Petitioner's argument, moreover, ignores not only the plain text but also the context of this sentence. *White v. Weiser*, the original source of the phrase on which Petitioner so heavily relies, was referring to the policies and preferences of a state as reflected in a "duly enacted statute of the State of Texas," which had been passed by the legislature *and* signed by Texas's governor—not proposed legislation that never became law. 412 U.S. at 795. The Court did not—nor has it ever—required lower courts to defer to a plan without the force of law. Tellingly, Petitioner cites no authority supporting his novel theory that unenacted legislative proposals are owed any deference by courts.

The *Carstens* court explained the absurd result of requiring a judicial override of the governor's veto: "To take the [Petitioner's] position to its logical conclusion, a partisan state legislature could simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the Court defer to their proposal." 543 F. Supp. at 79. This Court has never endorsed such an end-run around a state's lawmaking process. Instead, the Court has repeatedly held that state courts should—just as the Pennsylvania Supreme Court did here—take up the redistricting pen when the political process has failed and adopt a plan that complies with the "State's substantive policies and preferences for redistricting." *Branch*, 538 U.S. at 277–78 (citations omitted); *see also Growe*, 507 U.S. at 33–34.

Numerous other courts have followed this Court's instruction and rejected Petitioner's

argument. *See, e.g., 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."); *Wis. Elections Comm'n.*, 967 N.W.2d at 666 n.8 (rejecting argument that legislature's vetoed map was an expression of "the policies and preferences of the State[.]"); *Hippert v. Ritchie*, 813 N.W.2d, 374, 379 n.6 (Minn. 2012) ("[B]ecause the Minnesota Legislature's redistricting plan was never enacted into law, it is not entitled to [*Upham*] deference.") (citing *Perry v. Perez*, 565 U.S. 388, 392–96 (2012)); *Hartung v. Bradbury*, 33 P.3d 972, 979 (Or. 2001) (similar); *Wilson v. Eu*, 823 P.2d 545, 576 (Cal. 1992) (similar).

This Court's affirmance of *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750 (E.D. Tex. Nov 14, 2001), *summarily aff'd*, 536 U.S. 919 (2002), another impasse case where no redistricting plan had been enacted, is instructive. In *Balderas*, like here, the political branches had failed to enact a state redistricting plan following the 2000 Census. *See* 2001 WL 36403750, at *2. As a result, the court set out to "draw a redistricting plan according to neutral redistricting factors, including compactness, contiguity, and respecting county and municipal boundaries." *Id*. (cleaned up). As the Court explained, because "there was no recently enacted state plan," the *Balderas* court was "compelled to design an interim map based on its own notion of the public good." *Perry*, 565 U.S. at 396. There, the court owed no deference to the vetoed map.

As Petitioner admits, "it does *not* violate the Elections Clause for a court to redraw an unconstitutional map required by section 2a(c) if the state legislature is unwilling or unable to do so; to deny this would put the Elections Clause at war with

the rest of the Constitution." Pet. 25-26. And "it does *not* violate the Elections Clause for the state judiciary to enforce section 2c, as the Elections Clause specifically allows Congress to 'make or alter' regulations governing the manner of electing Representatives, and the Elections Clause requires the states to comply with those congressional enactments." *Id.* at 26. Faced with the "unwelcome obligation" of adopting a plan, Costello App. 4a, the Pennsylvania Supreme Court followed this Court's instruction in *Branch* and *White* and adhered to "policies and preferences of the State, as expressed in statutory and constitutional provisions." *Branch*, 538 U.S. at 274 (quotation omitted). Petitioner can point to nothing in state or federal law indicating that a vetoed proposal of a state legislature is owed judicial deference.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ABHA KHANNA
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Ave.
Suite 2100
Seattle, WA 98101
(206) 656-0177
AKhanna@elias.law

LALITHA D. MADDURI
CHRISTINA A. FORD
JYOTI JASRASARIA
ELIAS LAW GROUP LLP
10 G St. N.E.
Suite 600
Washington, DC 20002
(202) 968-4490

Counsel for Carter Respondents

August 16, 2022

CARTER SUPPLEMENTAL APPENDIX

APPENDIX

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APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 464 & 465 MD 2021
(CASES CONSOLIDATED)

[Filed: January 24, 2022]

CAROL ANN CARTER, ET AL.,
Petitioners,

v.

LEIGH M. CHAPMAN, ET AL.,
Respondents.

***

PHILIP T. GRESSMAN,
Petitioners,

v.

LEIGH M. CHAPMAN, ET AL.,
Respondents.

***

BRIEF OF GUY RESCHENTHALER, JEFFREY VARNER, TOM MARINO, RYAN COSTELLO, AND BUD SHUSTER

Matthew H. Haverstick (No.85072)
Joshua J. Voss (No.306853)
Shohin H. Vance (No.323551)

Samantha G. Zimmer (No.325650)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140

Attorneys for Congressional Intervenors

[*Table of Contents and Table of Authorities Have Been Omitted for Printing Purposes*]

I. INTRODUCTION & SUMMARY OF THE ARGUMENT

Although the task this Court is set to undertake is one that is ordinarily outside the province of the judiciary, in light of the continued legislative impasse, it has fallen on this Court to select an appropriate congressional redistricting plan. In undertaking this "unwelcome obligation,"[1] however, the Court is not without guidance, as both Federal and State law furnish a variety of useful parameters. Applying those settled precepts to this matter, the proposed redistricting plans attached hereto (labeled in Exhibits A and B as Reschenthaler 1 and Reschenthaler 2) not only amply comport with those baseline constitutional requirements, but also strive to effectuate the

[1] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006) (explaining that, where "the imminence of a state election makes it impractical" for the legislature to timely enact a redistricting plan, "it becomes the unwelcome obligation of the federal court to devise and impose a reapportionment plan" (internal quotation marks and citations omitted)).

fundamental pronouncements embodied in the Free and Equal Elections Clause of the State Constitution. In the end, while this Court may be presented with a number of minimally compliant plans, the attached maps are grounded in ***both*** the letter and spirit of the Commonwealth's Organic Charter.

II. QUESTIONS PRESENTED

1. Should the congressional redistricting plan denominated as Reschenthaler 1, or alternatively, the plan denominated as Reschenthaler 2 be adopted in the event a constitutionally compliant redistricting plan is not timely adopted by the General Assembly?

Suggested answer: yes.

2. Should the Court preliminarily enjoin further use and enforcement of the Election Code's provisions relating to the timeline for circulating, filing, and objecting to nomination petitions and immediately adopt the timetable proposed by the Congressional Intervenors for the 2022 General Primary?

Suggested answer: yes.

III. STATEMENT OF THE CASE

The United States Constitution requires a decennial census for the purpose of apportioning the House of Representatives—*i.e.*, allotting a total number of congressional seats generally proportional to the country's total population. *See* U.S. Const. art. I, § 2, cl. 3. By February of the year following the census, the Clerk of the House of Representatives is generally required to "send to the executive of each State a

certificate of the number of Representatives to which such State is entitled." 2 U.S.C. § 2a(b). In turn, each state must be redistricted in accordance with the ordinary legislative process, which in the Commonwealth of Pennsylvania requires a duly enacted law approved by the Governor.[2] In addition by April 1 of the year following the census, the Census Bureau is required to provide each state with the detailed tabulation of the data it collects, which is commonly referred to as the PL-94 Data, which contains the detailed information regarding population distribution necessary to begin the redistricting process in earnest.

A. Current congressional districts.

Following the 2010 census, Pennsylvania's apportionment of congressional seats was reduced from 19 to 18 and, in keeping with the above statutory scheme, on March 9, 2011, the PL-94 Data was transmitted to the Governor and the legislative leaders. *See generally Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 719 (Pa. 2012) (*Holt I*). In the subsequent months, a proposed redistricting plan was introduced in the General Assembly and, after proceeding through the ordinary legislative course, was signed into law as Act 131 of 2011 and remained in effect through the 2016 general election.[3]

However, on January 22, 2018—less than three weeks before the first day for circulating petitions for the May 15, 2018 primary—the State Supreme Court

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[2] *See id.*; *see also* U.S. Const. art. I, § 4, cl. 1.

[3] Act of Dec. 22, 2011, P.L. 599, No. 131, 25 P.S. §§ 3596.101 *et seq*.

declared the 2011 plan unconstitutional, enjoined its further use, and instructed that if a remedial plan was not enacted by February 15, 2018, it would be chosen by the Court.[4] Specifically, the Court held that, in addition to any requirements imposed by federal law, under the Free and Equal Elections Clause of the Pennsylvania Constitution, *see* Pa. Const. art. I, § 5, congressional redistricting plans must be: (1) compact; (2) contiguous; and (3) avoid dividing any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population. *See League of Women Voters v. Com.*, 178 A.3d 737, 816-17 (Pa. 2018) (internal quotation marks omitted).

After the General Assembly and the Governor failed to reach an agreement by that deadline, on February 19, 2018, the Court adopted its own congressional redistricting scheme, which remains in effect to date. *See League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018) (*per curiam*) (adopting a congressional redistricting plan) (*League of Women Voters II*). Concomitantly, the Court also approved various changes to the statutorily prescribed dates for circulating, submitting, and challenging nomination petitions. *See id.* at 1088 (adopting a "Revised Election Calendar" and attaching it as Appendix C, which, *inter alia*, set February 27, 2018 as the first day for circulating nomination petitions).

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[4] *See League of Women Voters v. Com.*, 178 A.3d 717, 821 (Pa. 2018) (*League of Women Voters I*).

B. 2020 Census and subsequent redistricting efforts.

Unlike the 2010 census, however, the results of the 2020 census were not transmitted in the ordinary course. Specifically, because of the government-ordered shutdowns throughout the spring and summer of 2020, as well as the extensive litigation surrounding the conduct of the census, the PL-94 data was not delivered to the Governor and the General Assembly until August 12, 2021—more than four months after the statutory deadline.[5] Notwithstanding the truncated timeline, the General Assembly—the branch vested with primary responsibility for overseeing elections—appeared poised to timely adopt a congressional redistricting plan, holding extensive hearings throughout the state and solicited significant public input from the voters regarding their preferences. Indeed, on December 15, 2021, the Pennsylvania House of Representatives State Government Committee approved a proposed plan, setting the stage for a robust debate by the full chamber.

C. Present actions filed in the Commonwealth Court.

In the midst of the ongoing legislative efforts, on December 17, 2021, Carol Ann Carter and fifteen other voters (the "Carter Petitioners") filed an action in this Court's original jurisdiction against Respondents Leigh M. Chapman, the Acting Secretary of the

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[5] Release of the apportionment counts was similarly delayed and was not transmitted until April 26, 2021.

Commonwealth (the "Secretary"),[6] and Jessica Mathis, the Director for the Pennsylvania Bureau of Election Services and Notaries (the "Elections Director"). Shortly, thereafter, Philip T. Gressman and eleven other voters (the "Gressman Petitioners") filed a similar action against the Secretary and the Elections Director. In general, both the Carter and Gressman Petitioners allege that their vote has been diluted because they reside in malapportioned districts and request declaratory and injunctive relief prohibiting use of the existing congressional redistricting plan for the 2022 May primary. Furthermore, although the Gressman Petitioners only request injunctive relief relative to the extant redistricting plan, the Carter Petitioners ask this Court to adopt a new congressional redistricting plan that complies with all applicable constitutional and statutory provisions. *Compare* Carter PFR, Prayer for Relief, at ¶(c), *with* Gressman PFR, Prayer for Relief.

On December 20, 2021, this Court entered an Order consolidating the Carter and Gressman Petitioners' actions and providing for an expedited schedule for their disposition "consistent with the process established in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992)." In accordance with the deadline established by that Order, Congressman Guy Reschenthaler, Swatara Township Commissioner Jeffrey Varner, and former Congressmen Ryan Costello, Bud Schuster, and Tom Marino (the "Congressional Intervenors") filed a timely Application to Intervene as Petitioners on December

[6] Acting Secretary Leigh M. Chapman was substituted as the successor to Acting Secretary Degraffenreid by Order of this Court, dated January 20, 2022.

31, 2021. On January 14, 2022, this Court issued an Order granting intervention to the Congressional Intervenors (as well as several parties seeking to intervene as Respondents), directing briefing, and scheduling the matter for a hearing to begin on January 27, 2022.

In accordance with this Court's Order, the Congressional Intervenors submit for consideration two redistricting plans—Reschenthaler 1 (attached hereto as Exhibit A) and Reschenthaler 2 (attached hereto as Exhibit B)—and a supporting Expert Report prepared by Dr. Thomas Brunell, which is attached as Exhibit C.

IV. ARGUMENT

Although "the primary responsibility for drawing congressional districts rest[s] squarely with the legislature," *League of Women Voters*, 181 A.3d at 1085, where a timely redistricting scheme has not been enacted, it may "become[] the unwelcome obligation" to select an appropriate plan. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 415 (2006) (internal quotation marks and citations omitted). The Court's task in this respect is guided by the same constitutional requirements that constrain the General Assembly.

Applying those precepts here, this Court should have no difficulty in determining that both redistricting plans proposed by the Congressional Intervenors satisfy the United States Constitution's one-person-one-vote requirement, complies with the Federal Voting Rights Act, and comports with the Free and Equal Elections Clause of the State Constitution.

A. The Congressional Intervenors' proposed redistricting plans are in full accord with the United States Constitution's equal population requirement.

As noted by then-President Judge Craig, who served as Special Master for the Supreme Court in *Mellow*, "the 'preeminent if not the sole,' criterion for appraising the validity of redistricting plans," *Mellow*, A.2d at 214 (quoting *Chapman v. Meier*, 420 U.S. 1, 23 (1964)), is whether it satisfies the United States Constitution's requirement that "one man's vote in a congressional election is to be worth as much as another's." *Id.* (quoting *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964)). In *Mellow*, the Court explained that this assessment is conducted by calculating the plan's "maximum total deviation" from the "ideal" population of a congressional district. Presently, all parties agree that the "ideal" population of a district based on the 2020 census is 764,864 or 764,865. As reflected in the table below, which is derived from Dr. Brunell's accompanying report, both plans offered by the Congressional Intervenors, have a maximum total deviation of one (1) voter and, thus, are properly populated

District	Reschenthaler 1	Reschenthaler 2
1	764,865	764,865
2	764,865	764,865
3	764,865	764,865
4	764,864	764,864
5	764,865	764,865
6	764,865	764,865

7	764,865	764,865
8	764,865	764,865
9	764,865	764,865
10	764,865	764,865
11	764,865	764,865
12	764,865	764,865
13	764,864	764,864
14	764,864	764,864
15	764,864	764,864
16	764,865	764,865
17	764,864	764,864

In short, therefore, both Reschenthaler 1 and Reschenthaler 2 fully comply with the primary consideration guiding this Court's analysis.

B. The Congressional Intervenors' proposals comply with the requirements of the Voting Right Act.

Similarly, the Congressional Intervenors' proposed plans are in full accord with the Voting Rights Act of 1965 (the "VRA") because sufficiently polarized voting does not exist and, thus, the VRA is simply not implicated. Specifically, in the context of redistricting, the United States Supreme Court has recognized that drawing district lines can have the effect of diluting voting strength of certain minority groups by either fragmenting voters among various districts, or packing them into a smaller district in violation of the Equal Protection clause. *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994); *see also Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) ("The Equal Protection clause prohibits a State, without sufficient justification, from separating its citizens into different

voting districts on the basis of race." (cleaned up)). It is well-settled, however, that three factors—commonly known as the *Gingles* factors—are "threshold conditions" for demonstrating dilution under Section 2 of the Voting Rights Act. *Cooper*, 137 S. Ct. at 1470. Under the *Gingles* Factors, the Court evaluates whether (1) the minority group is "sufficiently large and geographically compact to constitute a majority," (2) the minority group is "politically cohesive," and (3) the district's white majority votes "sufficiently as a bloc" such that it "defeat[s] the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If the three *Gingles* factors are met, then the Court must evaluate the totality of the circumstances, looking to the following factors:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group … ; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; … the extent to which members of the minority group have been elected to public office in the jurisdiction[;] … evidence demonstrating that elected officials are

> unresponsive to the particularized needs of the members of the minority group[;]and [whether] the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous[.]

League of United Latin American Citizens v. Perry, 548 U.S. 399, 426 (2006) (quoting *Gingles*, 478 U.S. at 44-45). If the *Gingles* factors are met, there is good reason to believe that Section 2 of the VRA mandates the creation of a minority-majority district, but, as succinctly put by the Supreme Court, "if not, then not." *Cooper*, 137 S. Ct. at 1470.

Therefore, if one of the *Gingles* factors, such as white bloc-voting, cannot be established then the requisite good reason for drawing a minority-majority district does not exist. *See Gingles*, 478 U.S. at 49 n.15 (noting that "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters"). In *Cooper*, for example, the Supreme Court concluded that a North Carolina district created for the purpose of Section 2 compliance did not survive strict scrutiny because the third *Gingles* condition was not met. *Id.* Indeed, the Court explained that for two decades, the district in question had been "an extraordinarily safe district for African-American preferred candidates," which, in turn, meant that the white population in the district did not vote as a bloc to overcome the minority voters' preference. *Id.* In light of this, there was no reason to believe that the district needed to be drawn to be in compliance with the Voting Rights Act. *See id.*; *see also Voinovich v.*

Quilter, 507 U.S. 146, 158 (1993) (declining to address the first two *Gingle*s factors where the third *Gingles* factor was not proven).

As in *Cooper*, the data analyzed by Dr. Brunell does not indicate racially polarized voting that necessitates a minority-majority district under the framework set forth above. Dr. Brunell's analysis of past elections in Philadelphia County involving a white Republican against a Black Democrat demonstrates an absence of polarized voting. Specifically, looking at homogeneous precincts for the 2012 Presidential election, 2018 House of Representatives election, and 2017 Pennsylvania Supreme Court election, Dr. Brunell found that a majority of Black and white voters voted for the Black candidate in all three elections. *See* Brunell Report at 10. Accordingly, based upon a precinct analysis, there is no indication that a white voting bloc exists that thwarts the minority from electing the candidate of its choice. Turning to an analysis of ecological regression, Dr. Brunell again estimated that white voters who voted for Black candidates were 62% in 2012, 70.2% in 2018, and 57.4% in 2017. In terms of Black voters for Black candidates, Dr. Brunell estimated these to be 98.3% in 2012, 97.7% in 2018, and 96.5% in 2017. *Id.* at 11. Finally, Dr. Brunell evaluated the data from the 2015 Democratic primary race and found once more, under both the homogeneous precinct and ecological regression analyses, that there was no indication of racially polarized voting. In the absence of the third *Gingles* factor showing that there is racially polarized voting such that a white voting bloc precludes the minority from being able to elect the candidate of their choice, Section 2 of the Voting Rights Act is not

implicated. Accordingly, Reschenthaler 1 and Reschenthaler 2 comply with the requirements of the Voting Rights Act. Accordingly, to the extent any of the alternative redistricting proposals submitted to this Court seek to rely on the VRA to justify their departure from the redistricting criteria identified in *League of Women Voters*, any argument along such lines should be rejected.

C. The Congressional Intervenors' proposals comport with the Pennsylvania Constitution.

In terms of the State Constitutional inquiry, the Congressional Intervenors' proposed maps not only satisfy the core requirements of the Free and Equal Elections Clause—as interpreted by *League of Women Voters*—but also the overarching principles it seeks to advance. *First*, measured against the guideposts established by the panel, both Reschenthaler 1 and Reschenthaler 2 amply satisfy the three basic requirements of the Free and Equal Elections Clauses: compactness, contiguity, and minimal municipal splits. *Second*, both plans are also tailored—insofar as possible—to effectuate the provision's overarching goal of "maintain[ing] the geographical and social cohesion of the communities in which people live and conduct the majority of their day-to-day affairs[.]" *League of Women Voters*, 178 A.3d at 814.

1. The Congressional Intervenors' proposed plans are compact, contiguous, and maintain the integrity of municipalities and wards to the greatest extent practicable.

Pursuant to the landmark *League of Women Voters* decision, in order to pass constitutional muster, a congressional redistricting plan must be: (1) compact; (2) contiguous; and (3) avoid "divid[ing] any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population[.]" *Id.* at 816-17 (internal quotation marks omitted). Although the Court "recognize[d] that other factors 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[,]" it emphasized that "these factors to be wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions." *Id.* at 817. As relayed by the *League of Women Voters* panel, because they "provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of such districts[,] … these neutral criteria [may not be] subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage[.]" *Id.* As explained below, the Congressional Intervenors' proposed plans—and, in particular, Reschenthaler 1—scrupulously adhere to these requirements.

(a) The Congressional Intervenors' proposed plans are comparable or superior to the existing congressional plan in their compactness scores.

Turning, initially, to the compactness requirement, although there are numerous mathematic compactness measurements, in declaring the 2011 plan unconstitutional, the *League of Women Voters* panel principally relied on the Reock Compactness Score and the Polsby- Popper Compactness Score, which seek to quantify compactness by assigning a score of 0 (least compact) to 1 (most compact). Specifically, the Court noted that the overall Reock and Polsby-Popper Compactness Score of the 2011 plan were .278 and .164. By contrast, the Court explained that based on a computer simulation that applied ***only*** the traditional redistricting criteria, the appropriate range of scores was between .31 and .46 under the Reock measurement, and between .29 and .35 under the Polsby-Popper test. Analyzed against this backdrop, both Reschenthaler 1 and Reschenthaler 2 amply satisfy the compactness requirements articulated by *League of Women Voters*.

As Dr. Brunell's analysis reflects, Reschenthaler 1 has a Reock Compactness Score of .435, which is only .024 units (*i.e.* 5.4%) lower than the existing plan's score of .459 and a Polsby-Popper Score of .363, which ***exceeds*** the current plan's score of .335 by .028 units (*i.e.*, 8.4%). Moreover, based on these measurements, not only is Reschenthaler 1 well within a constitutionally sound range of scores for a

redistricting plans, but is, in fact, in the upper echelon in both measurements.

Although ostensibly somewhat less compact, an analysis of Reschenthaler 2 yields a similar compactness score, with only a *de minimis* decrease. Specifically, it has a Reock Compactness Score of .424, which is only 7.6% lower than that of the current plan, and Polsby-Popper Compactness Score of .352, which—like Reschenthaler 2—exceeds that of the existing plan by 5.1%.

(b) The Congressional Intervenors' proposed plans satisfy the contiguity requirements.

Both Reschenthaler 1 and 2 also comply with the contiguity requirement contemplated the *League of Women Voters* panel. Although not extensively analyzed in that decision, in the context state legislative reapportionment under Article I, Section 16 of the State Constitution—which *League of Women Voters* expressly incorporated into the Free and Equal Elections Clause analysis—a "contiguous district" is defined as "one in which a person can go from any point within the district to any other point (within the district) without leaving the district, or one in which no part of the district is wholly physically separate from any other part." *Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1242 (Pa. 2013) (*Holt II*). Here, no part of any district in either Reschenthaler 1 or 2 is wholly separated from any other part and the configuration of the districts in both proposals allows travel from any point within the district to another point without leaving the district.

Accordingly, both Reschenthaler 1 and 2 satisfy the contiguity requirements.

(c) Maintaining the integrity of municipal boundaries and minimizing ward splits.

The final neutral criteria identified by the Court in *League of Women Voters* is the "minimization of the division of political subdivisions[,]" or—stated more precisely—a prohibition against "divid[ing] any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population." 178 A.3d at 817. Specifically, in holding that the 28 county splits and 68 municipal splits violated the Free and Equal Elections Clause, the Supreme Court explained that a constitutionally compliant redistricting plan would "generally split between 12–14 counties and 40–58 municipalities," *League of Women Voters*, 178 A.3d at 819, and ultimately adopted a plan that splits thirteen counties and nineteen municipalities. *See League of Women Voters*, 181 A.3d at 1087 (*per curiam*). Assessed within this framework, the municipal splits contained in both Reschenthaler 1 and Reschenthaler 2 are in full accord with *League of Women Voters*' standards.

With regard to the total number of counties that are split, the current map is identical to both Reschenthaler 1 and Reschenthaler 2, in that all three plans only split thirteen of Pennsylvania's sixty-seven counties. Moreover, Reschenthaler 1 and Reschenthaler 2 split those counties into fewer segments (29) than the current plan (30).

In terms of municipal splits, both Reschenthaler 1 and 2 contain sixteen such splits and, thus, outperform the current map, which contains 19. Similarly, both Reschenthaler 1 and 2 split these municipal units into 33 total segments—six less than the 39 in the current plan.

2. The Congressional Intervenors' proposed redistricting plan properly accounts for the community interests undergirding the Free and Equal Elections Clause.

A common thread running through *League of Women Voters* is that, to the greatest degree practicable, a congressional redistricting plan should avoid dividing a community with shared interests and concerns. Indeed, in adopting these "neutral criteria," the Court reasoned that "[t]hese standards place the greatest emphasis on creating 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[.]" *League of Women Voters*, 178 A.3d at 814.[7] Accordingly,

[7] Indeed, *League of Women Voters* panel repeatedly references the significance of communities in its analysis. *See id.* at 816 ("When an individual is grouped with other members of his or her community in a congressional district for purposes of voting, the commonality of the interests shared with the other voters in the community increases the ability of the individual to elect a congressional representative for the district who reflects his or her personal preferences."). Moreover, in evaluating the historic underpinnings that lead to the development of the neutral criteria it prescribed, the Court emphasized that the Free and Equal Elections Clause, in its original form, provided that "all elections

although compactness, contiguity, and respect for municipal boundaries, are undoubtedly the primary tool for evaluating the constitutionality of a redistricting plan, properly understood these principles serve to advance the Free and Equal Elections Clause's overarching goal of protecting the interest of communities.

With this in mind, to the extent the Court is presented with a series of maps, each of which satisfies the constitutionally prescribed criteria, then the Court should consider how those maps account for the subordinate communities of interest. When viewed in this light, this evaluation assumes greater significance in determining whether the proposed maps—insofar as they are otherwise constitutional—are actually fair and responsive to the day-to-day concerns of the each district's populace.

Because this consideration often proves difficult to measure, courts and commentators have attempted to capture this concept under the generalized rubric referred to as "communities of interests." This formulation is perhaps most relevant with respect to the Court's compactness and political subdivision split analyses because a fair map will, at times, sacrifice mathematical exactitude to maintain the contiguity of communities that share similar interests. *See* Stephen

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ought to be free; and that all free men having a sufficient evident common interest with, and ***attachment to the community***, have a right to elect officers, or to be elected into office." *Id.* (quoting Pa. Const. of 1776, art. I, § VII) (emphasis added); *see also id.* ("[I]t is evident that [our founders] considered maintaining the geographical contiguity of political subdivision, and barring the splitting thereof in the process of creating legislative districts").

J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA.L.REV. 461, 465-66 (1997) ("The matching of interests and representation allows voters with shared interests to have a voice in the legislature that is roughly correlated to their numbers.").

The term "communities of interest" encompasses, according to the esteemed Dean Ken Gormley, "school districts, religious communities, ethnic communities, geographic communities which share common bonds due to locations of rivers, mountains and highways[.]" *Holt I*, 38 A.3d at 746. In *Mellow*, the Court considered a community's "circulation arteries, its common news media …, its organization and cultural ties[,]" its "common economic base[,]" and the relationship among "schools of higher education as well as others." 607 A.2d at 220-21.

In other jurisdictions, courts consider similar factors. *See Diaz v. Silver*, 978 F.Supp. 96, 123 (E.D.N.Y. 1997) ("Common employment services, religion, economy, country of origin and culture"); *Carstens v. Lamm*, 543 F.Supp. 68 (D. Colo. 1982) ("geography, demography, ethnicity, culture, socio-economic status or trade"). And some states, like Colorado, even define communities of interest in the state constitution.[8] In *Carstens*, *supra*, the Colorado

[8] The Colorado Constitution defines "Community of interest" as follows:

> (b)(I) "Community of interest" means any group in Colorado that shares one or more substantial interests that may be the subject of state legislative action, is composed of a reasonably proximate population, and thus should be considered for

district court considered important, *inter alia*, urban areas with aging infrastructure; communities linked naturally by a highway, which resulted in commercial expansion; communities based in agriculture; and communities with a strong environmental and energy sectors. *See id*. at 96-97.

At first glance, a communities of interest analysis may seem ephemeral, unworkable, and easy to manipulate. *See* Samuel S.H. Wang, et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203, 244 (2019) ("Of all the criteria considered by most states, perhaps the most malleable and least quantifiable yet, of

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inclusion within a single district for purposes of ensuring its fair and effective representation.

(II) Such interests include but are not limited to matters reflecting:

(A) Shared public policy concerns of urban, rural, agricultural, industrial, or trade areas; and

(B) Shared public policy concerns such as education, employment, environment, public health, transportation, water needs and supplies, and issues of demonstrable regional significance.

(III) Groups that may comprise a community of interest include racial, ethnic, and language minority groups, subject to compliance with subsections (1)(b) and (4)(b) of section 48.1 of this article V, which subsections protect against the denial or abridgement of the right to vote due to a person's race or language minority group.

(IV) "Community of interest" does not include relationships with political parties, incumbents, or political candidates.

Colo. Const. art. V, §46(b).

central conceptual importance, is that districts preserve 'communities of interests.'"). And, indeed, without a sound framework to constrain its reach, it can doubtless become unworkable. But upon a more careful examination, a communities of interest analysis when, "[w]ielded well," can be "powerful in enhancing representation[.]" Michael Li, Yurij Rudensky, *Rethinking the Redistricting Toolbox*, 62 How. L.J. 713, 732 (2019). Indeed, *Mellow* and *Holt* demonstrate the central role that shared communal interests play in the redistricting process. Similarly, while *League of Women Voters* did not give the concept practical application, the Court's analysis demonstrates that these principles are rooted—at least in some measure—in the Free and Equal Elections Clause.

Thus, rather than be deterred by the difficulties attendant enforcing communities of interest criteria, this Court should draw upon its own experience and embrace evidence—objective and subjective—consistent with the Commonwealth's precedent to determine whether sufficient evidence exists to identify a particular community of interest. *See id*. at 733 (objective evidence—including census data—combined with subjective evidence—including residents' opinions—can be sufficient evidence to prove a community of interest exists); *see also Favors v. Cuomo*, 2012 WL 928216, at *13 (E.D.N.Y. 2012) (crediting testimony about "certain widely recognized, geographically defined communities").

In many ways, redistricting's most basic objective is to provide communities with adequate representation. Indeed, "[t]o be an effective representative, a legislator

must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents." *Prosser v. Elections Bd.*, 793 F.Supp. 859, 863 (W.D. Wis. 1992); *see Hall v. Moreno*, 270 P.3d 961, 971 (Colo. 2012) ("if an important issue is divided across multiple districts, it is likely to receive diffuse and unfocused attention from the multiple representatives it affects, as each is pulled in other directions by the many other issues confronting their districts. However, if a discrete and unique issue is placed in one district, that representative may familiarize herself with the complexities of the issue and the stakeholders it affects.").

This Court can properly wield the community of interest considerations used in *Mellow*, *Holt*, and to some degree, *League of Women Voters*, to adopt a map that more accurately, and more fairly represents the citizens of this Commonwealth based on the practical concerns of their daily lives. These considerations—economic, employment, age, income, education, industry, transportation—are not made from whole cloth, but are, in many ways, tied to federal regulations for which representatives advocate. An area with an aging population may have Medicare and Social Security concerns that predominate, whereas an area with a robust higher education presence, or regional hospital network might be concerned with funding for expanding those networks, or increasing investment in roads and public transportation for better access to their jobs.

With this in mind, it is easy to understand how a communities of interest analysis is precisely where the computer-programed, mathematically-exact, maps fail. A computer algorithm can undoubtedly produce thousands—if not millions—of maps that satisfy the compactness, contiguity, equal population, and minimized splits mandated by the *League of Women Voters* Court. But of that vast batch, how many are workable based on Pennsylvania's communities and geography? Any county or municipality can be sliced and diced in hundreds of ways, but which way makes the most sense based on the needs of the communities in those areas? These are the questions the computer cannot answer.

Congressional Intervenors suggest their maps, in addition to satisfying every constitutionally required measure, best account for the realities of daily life in communities across the Commonwealth. In particular the Congressional Intervenors highlight the following examples of how the needs of certain communities of interest inform the quality of their proposed maps.

(a) Allegheny County

Allegheny County is split between the 2nd and 3rd Congressional District. This split is sensible because it keeps Pittsburgh intact in the 3rd district. Moreover, the Reschenthaler maps are split in the north between Pine, McCandless and Ross in the west and Richland, Hampton, and Shaler in the east, and this is an appropriate dividing line based on the transportation corridors in those regions. For example, Richland, Hampton, and Shaler share the Route 8 corridor into Pittsburgh and have a closer communal ties to other

municipalities in the east. This example, and others including industrial, educational, and transportation interests demonstrate how Reschenthaler maps 1 and 2 endeavored to adhere to the communities of interest in Allegheny County.

(b) Lackawanna County

Lackawanna County is split such that Scranton and cities like, Dickson City, Archibald, Olyphant, and Jessup—*i.e.*, the more urban areas—are all within the 10th Congressional District. The municipalities to the east and south of the Moosic Mountains—*i.e.*, Spring Brook, Roaring Brook, Elmhurst, Moscow, Covington, Madison, Jefferson, and Clifton—are kept together in the 9th district. This is appropriate because these municipalities are more rural communities that share the same school district. And in the northeastern corner, Vandling, Fell, and portions of Carbondale share commercial and commuter connections with the adjacent Wayne County. In addition, all of these municipalities to the east share many of the same concerns as political subdivisions in Wayne, Pike, and northern Monroe Counties, which are also in the 9th district.

(c) Washington County

Washington County is split between the 2nd and 4th districts. Included in the 4th district is the Mid-Mon Valley that extends through Washington, Westmoreland, and Fayette Counties. The communities contained within the western boarder of the 4th district share manufacturing interests, a public transit authority, and a regional health system. As such, the

Reschenthaler maps seek to keep these communities together within the 4th district.

(d) Monroe County

Reschenthaler maps 1 and 2 attempt to keep eastern and southern Monroe County with Leigh and Northhampton Counties because these regions are historically commuter suburbs that see significant influx of travel from New York and New Jersey. In addition, these three regions are composed of several universities and hospital networks. And the western portion of Monroe County, encompasses the resort region of the Poconos where camps, resorts, and second homes abound, and local residents cater to those community assets.

(e) Dauphin County

Dauphin County is split to the north between the 7th and 8th districts with Upper Dauphin contained in the 7th district. Upper Dauphin County composes roughly the entire region north of the Blue Mountain. This region is much moral rural than Lower Dauphin, and citizens in Upper Dauphin commute less to Harrisburg and its surrounding environs. This Upper Dauphin region has commercial centers and communities more closely tied to Schuylkill and Northumberland Counties. For these reasons, Reschenthaler maps 1 and 2 include the Upper Dauphin region in the 7th Congressional District.

Moreover Derry Township is split from Dauphin County and included in the 9th district because it shares a significant commercial, cultural and

transportation connections with Lebanon and Lancaster Counties.

(f) Cambria County

The Reschenthaler map sensibly separates Cambria County between its northern and southern sections. The southern section, contained in the 4th district, features Johnstown, and blends fairly seamlessly with Somerset County. This southern region retains a significant manufacturing sector—including in the defense and technology sectors. The northern section, which is contained in the 5th district, is more rural and does not contain the significant manufacturing presence that the southern region has. In this light, the northern part of Cambria County is more similar to neighboring Clearfield County.

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In sum, in addition to satisfying every one of the neutral redistricting criteria identified by the Supreme Court, Reschenthaler 1 and 2 also carefully place their county splits so that municipalities with identifiable common interests are kept in the same district. In addition, the mathematically unforgiving compactness scores will not fully appreciate that Reschenthaler 1 and 2 attempt to keep political subdivisions whole—consistent with communities of interest—while also accounting for the political geography of the state. In this way, the Reschenthaler maps offer a more fair map that accurately "creat[es] representational districts that both maintain geographical and social cohesion of the communities in which people live and conduct the

majority of their day-to-day affairs[.]" *League of Women Voters*, 178 A.3d at 814.

D. The Congressional Intervenors' proposals satisfy the relevant extra-constitutional considerations.

To the extent this Court is asked to consider other factors—such as "competitiveness," or "incumbency protection"—it bears noting that, while such an inquiry is not prohibited, it is strictly circumscribed. Specifically, while the Supreme Court *League of Women Voters* "recognize[d] that other factors 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[,]" it cautioned that it "view[s] these factors to be wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts." *Id.* at 817. Nevertheless, to the extent this Court finds such an inquiry appropriate, the Congressional Intervenors' maps also satisfy these subordinate considerations. Specifically, the Congressional Intervenors' proposals accurately reflect the political makeup of the Commonwealth and maintain the proper balance of political power.

To explain, in *League of Women Voters*, the Court considered several measures of partisan advantage including, the efficiency gap, partisan voter index (the "PVI"), and the mean-median vote gap. Importantly, the Court noted Judge Brobson's skepticism concerning

the efficiency gap's short-comings,[9] and did not solely rely on it; rather, the Court compared several metrics which, on whole, demonstrated the 2011 congressional map was unconstitutional. *See League of Women Voters*, 178 A.3d at 818-821. As this Court considers these metrics, it should also bear in mind the potential downfalls of overly competitive plans. In *Rucho v. Common Cause*, 139 S.Ct. 2484 (2019), the High Court explained the difficulty of setting a clear and manageable fairness standard with respect to redistricting because

> [t]here is a large measure of 'unfairness' in a winner-take-all system. Fairness may mean a greater number of competitive districts .... But

[9] Judge Brobson "opined that the full meaning and effect of the gap 'requires some speculation and does not take into account some relevant considerations, such as quality of candidates, incumbency advantage, and voter turnout.' The court expressed additional concerns that the efficiency gap 'devalues competitive elections,' in that even in a district in which both parties have an equal chance of prevailing, a close contest will result in a substantial efficiency gap in favor of the prevailing party." *Id.* at 778 (internal citations omitted). He further explained:

> [s]ome unanswered questions that arise based on Petitioners' presentation include: (1) what is a constitutionally permissible efficiency gap; (2) how many districts must be competitive in order for a plan to pass constitutional muster (realizing that a competitive district would result in a skewed efficiency gap); (3) how is a "competitive" district defined; (4) how is a "fair" district defined; and (5) must a plan guarantee a minimum number of congressional seats in favor of one party or another to be constitutional.

Id. at 783 n.52.

> making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, 'if all or most of the districts are competitive … even a narrow statewide preference for either party would produce an overwhelming majority for the winning party.'"

Id. at 1250 (internal citation omitted).

Similarly, Nathanial Persily, who served as an expert advisor in *League of Women Voters* and assisted the Court in developing the current redistricting plan, observed that:

> [A] districting scheme that seeks to maximize district-level partisan competition could lead to a legislature wildly unrepresentative of the partisan preferences of the state's population.
>
> A simple example illustrating the worst-case scenario helps prove this point. In a state with a voting population equally divided in its loyalties, the pro[-]competition redistricter would create as many districts as possible in which Democrats and Republicans each constitute 50% of the district population. Under such conditions, the slightest shift in voter preferences would lead to a landslide victory for one of the parties. If, for example, a presidential winner has coattails that shift 5% of the vote to his party, then that party could win almost 100% of the seats in the legislature, despite the fact that 45% of the voters voted for the opposition.

Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case For Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV.L.REV. 649, 668 (2002) (footnotes omitted).

Although the Congressional Intervenors were principally guided by the requirements of the United States Constitution and the Free and Equal Elections Clause, in devising both Reschenthaler 1 and 2, they were cognizant of partisan and competitive fairness precepts. As developed below, the resulting maps are sufficiently responsive to voters in each of the districts created.

First, according to the PVI, the Reschenthaler maps create enough competitive districts such that "the majority of the state's congressional delegation may be decide by the political tides and the quality of the candidates and campaigns in each election." Brunell Report at 8 (Ex. C).

The PVI was calculated by comparing the results of the 2016 and 2020 presidential elections because both were "high profile elections with well-funded candidates" and both resulted in "relatively close" wins—one for Republicans, the other for Democrats. *Id.* at 7. Dr. Brunell "averaged the vote percentage for the Democrat for each district across these two elections and then subtracted 50 percent from each one. Thus if the result is zero, that means the Democrat averaged 50 percent" meaning the district is very competitive. *Id.*

According to Dr. Brunell, a district with less than plus or minus five percent is considered a toss-up district. According to Dr. Brunell's PVI analysis, the

Reschenthaler maps are substantially similar to the 2018 court-drawn map, each creating eight republican, five democrat, and 4 toss-up districts, as compared to the 2018 map's seven-six-five breakdown. *See id.* at 8. At bottom, the Reschenthaler maps, as with the 2018 map, have a sufficient number of competitive districts such that the party with a minority of presumably safe seats can achieve a majority of seats. This, of course, is based on factors that are often difficult to account for—*i.e.*, candidate strength, funding, wave elections, and a shifting electorate—and thus will be dependent on the facts specific to each election. *See Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) ("Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.").

Second, the mean-median vote gap also compares equally to the 2018 map. This "method takes the mean (average) vote percentage for one party across all the districts and compares it to the median of the same set of vote percentages." Brunell Report at 8. For example, "[i]f the Democratic average votes percentage is 55 percent and the Democratic median vote percentage in the same election is 50 percent, there is a 5 percent difference that favors Republicans." This metric is based on logic that if "one party is 'packed' into a handful of districts they are at a disadvantage and this will inflate the average vote percentage for that party, while the median of a distribution will be unaffected." *Id*. Ultimately, "the closer the mean and median are to one another the less skewness or bias there is in the plan." *Id.*

For his analysis, Dr. Brunell calculated the mean-median differences for the 2018 map and Reschenthaler maps 1 and 2 across all of the presidential, senatorial, and gubernatorial elections in Pennsylvania for the last decade. Dr. Brunell also added the three other statewide elections from 2020 because "Pennsylvania made two important changes to their elections beginning in 2020—[it] eliminated straight-party voting and instituted no excuse vote-by-mail." *Id*.

Dr. Brunell opined '[w]hile there are no 'bright lines' for when a difference becomes 'significant,' all of these scores [from his analysis] are reasonably low." *Id*. at 8-9. In *League of Women Voters*, the Court considered a mean-median vote gap between 0 to 4 percent as competitive. *See League of Women Voters*, 178 A.3d at 820. As such Congressional Intervenors submit a mean-median index below 4 percent is indicative of a sufficiently competitive map.

Here, the mean-median index for Reschenthaler maps 1 and 2 across all the above referenced elections ranges from 0 to 3.8 percent. And, the average mean-median index for Reschenthaler maps 1 and 2 across all of those races in the past decade are 1.85 and 1.89 respectively. These numbers indicate that Reschenthaler maps 1 and 2 are competitive and subject to the changes in the electorate and other election-specific factors. Moreover, the Reschenthaler maps stay below the 4 percent threshold, whereas the 2018 map peaked at 4.3 percent in one election.

Third, these two metrics—considered together—offer proof that Reschenthaler maps 1 and 2 provide a

fair partisan balance, and a sufficient number of competitive districts. And, to be clear, these metrics—especially when viewed together—offer a more complete assessment of the partisan fairness than the efficiency gap test. Although the efficiency gap test has been considered by courts, including the Pennsylvania Supreme Court, it has never been relied on *in toto* because its shortcomings limit its effectiveness.

For example, the efficiency gap test punishes competitive districts because all of the votes cast by the losing party are considered wasted. *See* Mira Bernstein and Moon Duchin, *A Formula Goes to Court: Partisan Gerrymandering and The Efficiency Gap*, at 3 (2017), *available at* https://arxiv.org/abs/1705.10812. The efficiency gap test also does not account for the political geography of Pennsylvania—meaning it does not account for voters of the same party naturally packed in groupings across the state—and it assumes voters will vote consistent with past elections. *See* Christopher P. Chambers, et al., *Flaws in the Efficiency Gap*, 33 J.L.& POL. 1, 6-12, 30 (2012). The efficiency gap can also create an absurd result whereby an district made up of 100 percent of voters from one party would be considered to have a 50 percent efficiency gap score (because the other party had no votes to waste), and thus be over the acceptable 8 percent threshold. Christopher P. Chambers, et al., Flaws in the Efficiency Gap, 33 J.L.& Pol. 1, 14 (2012). These flaws, in addition to others, are part of the reason the Judge Brobson was hesitant to fully endorse the efficiency gap as the sole test for measuring gerrymandering. *See supra*.

This is not to say that the efficiency gap test is wholly unreliable; rather when the efficiency gap test is used alongside other metrics of partisan measure—particularly ones that do not punish competition—it deserves less weight.

As such, Reschenthaler maps 1 and 2 are fair and competitive such that each party has stronghold districts, while simultaneously providing enough toss-up districts that either party can—factoring in election-specific factors like candidate, funding, and electorate shifts—capture a majority of congressional seats.

E. The Court has until at least February 22, 2022 to review, consider and select a congressional reapportionment plan before the 2022 General Primary Election would be impacted.

Finally, Petitioners have attempted to create a number of false "deadlines" by which the General Assembly, the Governor, and/or this Court must purportedly act to either enact or select a congressional reapportionment plan before the date of the 2022 General Primary Election must allegedly be moved or changed. However, based on the Pennsylvania Supreme Court's rulings and guidance in *League of Women Voters*, it would be possible and, indeed, entirely feasible to hold the 2022 General Primary Election on May 17, 2022, as currently scheduled, so long as a congressional redistricting plan is in place by February 22, 2022.

In *League of Women Voters*, the Governor and the Secretary of the Commonwealth took the position that

the 2018 General Primary Election could be held on May 15, 2018, and would not need to be moved or changed, if a new congressional redistricting map was in place on or before February 20, 2018. *See* 178 A.3d at 791. Based on these representations by the Governor and the Secretary, the Supreme Court adopted its own remedial congressional redistricting plan on February 19, 2018, and approved of a Revised Election Calendar, as proposed by the Secretary and the Commissioner of the Bureau of Commissions, Elections and Legislation, which moved and shortened certain election-related deadlines for the 2018 General Primary Election.[10] *See League of Women Voters* 181 A.3d 1087-88. Specifically, the Revised Election Calendar for the 2018 General Primary Election provided, among other things, that: (a) February 27th would be the first day to circulate and file nomination petitions; (b) March 20th would be the last day to circulate and file nomination petitions; (c) March 27th would be the last day to file objections to nomination petitions; and (d) April 4th would be the last day for this Court to render decisions in cases involving objections to nomination petitions.[11]

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[10] Similarly, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), which involved an impasse between the General Assembly and the Governor similar to the one Petitioners portend here, the Supreme Court adopted a congressional redistricting plan and simultaneously made various adjustments to the election calendar to afford the Secretary adequate opportunity to implement the plan.

[11] Notably, the 2018 Revised Election Calendar includes a provision directing the county boards of elections to count any military-overseas absentee ballots received up to one week after the primary election to ensure compliance with the 45-day requirement of the Federal Uniformed and Overseas Citizens

Given the Supreme Court's decision in *League of Women Voters*, this Court has, at a minimum, until at least February 22, 2022 to review, consider and select, if necessary, a congressional redistricting plan before the date of the 2022 General Primary Election would need to be moved or changed. This is entirely consistent with the February 20th deadline proposed by the Governor and the Secretary in *League of Women Voters* to ensure that the 2018 General Primary Election would be held on May 15, 2018. *See* 178 A.3d at 791. Indeed, the only notable factual difference between the election-related deadlines adopted and approved by the Supreme Court in *League of Women Voters* and this case is that the 2018 General Primary Election was scheduled for May 15th, and the 2022 General Primary Election is currently scheduled for May 17th, two days later. Thus, the Court can and should simply adopt and approve the same election-related deadlines from *League of Women Voters*, including each of the deadlines set forth in the Revised Election Calendar for the 2018 General Primary Election, with the addition of two extra days to accommodate the date discrepancy between the 2018 and 2022 General Primary Elections.[12] Doing so would

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Absentee Voting Act ("UOCAVA"). *See* 52 U.S.C. § 20302(a)(8) (requiring states to "transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter … not later than 45 days before the election").

[12] A Revised Election Calendar for the 2022 General Primary Election based on *League of Women Voters* would provide, among other things, that: (a) February 29th would be the first day to circulate and file nomination petitions; (b) March 22th would be the last day to circulate and file nomination petitions; (c) March 29th would be the last day to file objections to nomination

not only give the Court additional time to carefully review, consider, and select a new congressional redistricting plan, but it also would ensure that the 2022 General Primary Election remains on schedule for May 17, 2022.

V. CONCLUSION

For the foregoing reasons, the Court should adopt Reschenthaler 1 or Reschenthaler 2 as the Court-adopted congressional map.

Respectfully submitted,

Dated: January 24, 2022

/s/ Matthew H. Haverstick
Matthew H. Haverstick (No. 85072)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
Samantha G. Zimmer (No. 325650)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
jvoss@kleinbard.com

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petitions; and (d) April 6th would be the last day for this Court to render decisions in cases involving objections to nomination petitions. Again, this accommodates the two-day discrepancy between the March 15, 2018 General Primary Election and the May 17, 2022 General Primary Election.

svance@kleinbard.com
szimmer@kleinbard.com

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APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 MM 2022

[Filed February 14, 2022]

CAROL ANN CARTER, ET AL.

v.

LEIGH M. CHAPMAN, ET AL.

***

PHILIP T. GRESSMAN, ET AL.

v.

LEIGH M. CHAPMAN, ET AL.

BRIEF IN SUPPORT OF SPECIAL MASTER'S REPORT AND EXCEPTIONS TO SPECIAL MASTER'S REPORT BY GUY RESCHENTHALER, JEFFREY VARNER, TOM MARINO, RYAN COSTELLO, AND BUD SHUSTER

Matthew H. Haverstick (No. 85072)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
Samantha G. Zimmer (No. 325650)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000 | Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com
szimmer@kleinbard.com
Attorneys for Congressional Intervenors

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I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

As developed in the ensuing pages, the Congressional Intervenors are in full accord with many aspect of the Special Master's recommendations. Indeed, in terms of the proposed findings of fact, the Special Master's Report ("SMR") ably and fairly relays the content and nature of the facts adduced in the proceedings and, with the exception of a few minor miscalculations that are undoubtedly the product of the expedited nature of these proceedings, its factual rendition is free of error. Similarly, a substantial portion of the Special Master's proposed legal conclusions are well reasoned and should be adopted. In particular, the SMR's recommendations are cogent and well-grounded with regard to compactness and

contiguity, the importance of communities of interest, the role of partisan considerations in the present matter, the "least change" approach to redistricting advocated by the Carter Petitions, and the use of prisoner-adjusted census data.

Nevertheless, some errors warrant closer scrutiny from this Court. *First*, the Special Master's proposed finding that the Carter Plan splits only 13 counties, rather than 14, is not supported by the record and is contrary to law. *Second*, the Special Master's assessment of the equal population requirement under the United States Constitution is legally flawed. *Third*, the Special Master misconstrued the United States Constitution's prohibition against racial gerrymandering, as applied to the present action. *Fourth*, the Special Master misinterpreted the prohibition against splitting political subdivisions unless "absolutely necessary" and did not afford this consideration sufficient weight. *Finally*, in light of the foregoing, the Special Master also erred in her ultimate recommendation that this Court should select HB 2146, rather than Reschenthaler 1 or 2.

II. BACKGROUND

A. Constitutional Factors for a Congressional Plan

1. Equal Population

Reschenthaler 1 and 2 achieve equal population because both maps have only a one person deviation between districts—which is the lowest possible deviation. *See* **Special Master Report ("SMR") at 138, ¶¶ CL1-CL2**; *see also* N.T. 1/27/22 at 164:15-23

(Dr. Rodden); *id*. at 284:21-285:8 (Dr. DeFord); *id*. at 458:9-13 (Dr. Duchin); Brunell Report at 1-2.

Only the House Democratic Caucus map and the Carter map deviate by ***more*** than one person—both have a two person deviation. *See* **SMR at 138, ¶ CL2**; *see also* N.T. 204:4-20 (Dr. Rodden).

2. Compactness

Reschenthaler 1 and Reschenthaler 2 have compactness scores in a narrow range and do not feature highly non-compact districts based upon Dr. Rodden's calculations. *See* **SMR at 65, ¶ FF48**; *see also* Rodden Reply Report at 3; N.T. 1/27/22 at 166:10-17. Dr. Rodden is "confident" in the numbers in his report. *See* N.T. 1/27/22 at 163:20-164:7.

Further, based upon Dr. DeFord's review, Reschenthaler 1 and Reschenthaler 2 have equal or better compactness scores on every measure as compared to the Gressman Map. *See* **SMR at 69, ¶¶ FF77- FF78**; *see also* N.T. 1/27/22 at 285:13-22; DeFord Reply Report at 9.

Dr. Duchin agrees that Reschenthaler 1 and Reschenthaler 2 have compact districts. *See* **SMR at 79, ¶¶ FF137-FF138; SMR at 147-148, ¶¶ FF1-3**; *see also* N.T. 1/27/22 at 458:15-22. Dr. Duchin is "very confident in her numbers." *See* N.T. 1/27/22 at 457:16-458:1. She rated Reschenthaler 1 as a plan that meets "a high excellence standard for traditional criteria," and rated Reschenthaler 2 as a plan that meets "an excellence standard for traditional criteria[.]" *See* **SMR at 79-80, ¶¶ FF138-139**; *see also* Duchin Reply Report at 3.

Reschenthaler 1 has an average Reock score of .435. *See* Brunell Report at 3; N.T. 1/27/22 at 168:3-11 (Dr. Rodden testifying, stating Reschenthaler 1 has a Reock score of .43). Reschenthaler 1 has an average Polsby-Popper score of .363. *See* Brunell Report at 3. Reschenthaler 2 has an average Reock score of .424. *See* Brunell Report at 3; N.T. 1/27/22 at 168:3-11 (Dr. Rodden testifying). Reschenthaler 2 has an average Polsby-Popper score of .352. Brunell Report at 3.

Reschenthaler 1 and Reschenthaler 2 are reasonably compact. *See* **SMR at 104, ¶ FF278**; *see also* Brunell Report at 2-3.

3. Contiguity

All 17 districts in Reschenthaler 1 are contiguous, as multiple experts concluded. *See* **SMR at 137-138, ¶¶ CL1-CL3**; *see also* N.T. 1/27/22 at 165:3-9 (Dr. Rodden); N.T. 1/27/22 at 285:9-12 (Dr. DeFord); N.T. 1/27/22 at 458:4-8 (Dr. Duchin); Brunell Report at 2.

4. Splits of Counties, Municipalities, and Wards

Reschenthaler 1 and 2 split just 13 counties. *See* **SMR at 144-145, ¶¶ FF21-FF22; SMR at 147, ¶ FF41-FF42**; **SMR at 193, ¶ 24**; *see also* N.T. 1/27/22 at 166: 3-9 (Dr. Rodden); *id.* at 458:23-459:4 (Dr. Duchin); Brunell Report at 4. No other maps before the

Court split *fewer* Counties.[1] *See* **SMR at 146, ¶ FF36; SMR at 147, ¶ FF41; SMR at 193, ¶ 24**.

Reschenthaler 1 and 2 also had only 29 county "pieces" or "segments," which was also the fewest of all the maps before the Court. *See* **SMR at 206-07, ¶ 54.**

Reschenthaler 1 and 2 split just 16 municipalities. *See* **SMR at 144-145, ¶¶ FF21-FF22; at 147, ¶ FF41-FF42; SMR at 193, ¶ 24**; *see also* Duchin Reply Report at 2 (Table 1); Barber Reply Report at 8; Brunell Report at 5 (Table 5).

No other maps before the Court split *fewer* municipalities (though some split an equal amount). *See* **SMR at 146, ¶ FF37; SMR at 147, ¶ FF41; SMR at 193, ¶ 24** ("The Reschenthaler Plans remarkably divide only 13 counties and 16 municipalities, which is the lowest numbers in both categories.").

Reschenthaler 1 and 2 split those municipalities into only 33 "segments," or "pieces." *See* **SMR at 206-07, ¶ 54.** Again, although some split an equal amount,

[1] While the Special Master's Report finds that the Carter map also only splits 13 counties, *see* **SMR at 143, ¶ FF 7**, that finding is predicated on an error, as explained in the argument section below. And even if true, Reschenthaler 1 and 2 remain the *only* maps that split just 13 counties **and** just 16 municipalities; all others split more in one or both government units. *See* **SMR at 147, ¶ FF41**("It is worth emphasizing, however, that of all the plans proposed, only the Reschenthaler Plans were able to divide only 13 counties and 16 municipalities—the lowest number in both categories."); *see* **SMR at 193, ¶ 24** ("The Reschenthaler Plans remarkably divide only 13 counties and 16 municipalities, which is the lowest numbers in both categories.").

no other proposal before the Court contained fewer municipal "segments" or "pieces."

At least three experts—none of whom were experts for the Congressional Intervenors—testified that it is possible to create a 17- district plan that splits only 13 counties and 16 municipalities, and still has equal population, is contiguous, and is reasonably compact—just as Reschenthaler 1 and 2 propose. *See* **SMR at 147, ¶¶ FF42-FF43**; *see also* N.T. 1/27/22 at 43:19-25; 170:15-20 (Dr. Rodden); N.T. 1/27/22 at 287:11-20 (Dr. DeFord); N.T. 1/27/22 at 461:5-21 (Dr. Duchin).

Finally, Reschenthaler 1 and 2 split 25 wards and 24 wards, respectively. *See* **SMR at 144-145, ¶¶ FF21-FF22**; *see also* DeFord Reply Report at 7, ¶ 20 (Table 5); Brunell Report at 6 (Table 7).

5. Communities of Interest

Dr. Keith Naughton explained that in order to achieve a good score under certain compactness models, certain communities may be included where they would not otherwise fit in terms of a community of interest. *See* **SMR at 154, ¶¶ FF2-FF4; SMR at 155, ¶¶ FF7, FF9**; *see also* N.T. 1/28/22 at 709:12-710:12. Dr. Naughton found that a compactness score may not be satisfied when communities are grouped together based upon their interests. **SMR at 154, ¶¶ FF2-FF4; SMR at 155, ¶¶ FF7, FF9**; *see also* N.T. 1/28/22 at 712:1-16. Dr. Naughton testified that keeping people with common interests together allows for better representation of those interests. *See* **SMR at 155, ¶¶ FF6-FF7**; *see also* N.T. 1/28/22 at 697:5-698:3.

To support his opinion regarding communities of interest, Dr. Naughton focused on a few key areas in the Commonwealth. For instance, he noted that Reschenthaler 1 and 2 keep Pittsburgh within one district. *See* **SMR at 95, ¶ FF228**. Dr. Naughton testified that Pittsburgh's communities of interests are best represented by keeping the city within the same district. *See* **SMR at 96, ¶ FF229; SMR at 155, ¶ FF5**; *see also* N.T. 1/28/22 at 712:21-715:13.

Dr. Naughton further noted that Reschenthaler 1 and 2 keep Bucks County within one District, and not with Philadelphia County. *See* **SMR at 157, ¶ FF15**. Dr. Naughton testified that the communities within Bucks County are best served by keeping the County within the same district and connecting it with nearby Montgomery County instead of with Philadelphia. *See* **SMR at 157-159, ¶¶ FF15-FF21;** *see also* N.T. 1/28/22 at 715:14-716:13. In a similar vein, he noted that Reschenthaler 1 and 2 connect Philadelphia with Delaware County in District 16. *See* **SMR at 96, ¶ FF230**. Dr. Naughton testified that Delaware County and Philadelphia county share similar communities of interest along their border, and that a map connecting them was ideal. *See* **SMR at 159, ¶¶ FF19-FF21**; *see also* N.T. 1/28/22 at 786: 19-24; 840: 21-841:2.

Finally, Dr. Naughton observed that Reschenthaler 1 and 2 place Scranton and Wilkes-Barre in different districts. *See* **SMR at 96, ¶ FF231**. Dr. Naughton testified that Scranton and Wilkes-Barre, in the past, were in separate districts and that those communities prefer being in separate districts. *See* **SMR at 96, ¶ FF231**; *see also* N.T. 1/28/22 at 734:2-736:12.

6. Partisan Fairness and Pennsylvania Geography

(a) Mean-Median Scores

Reschenthaler 1 and 2 score well on the mean-median metric, regardless of the expert consulted; indeed, by expert, the scores were found to be as follows:

MEAN-MEDIAN

Expert	Resch. 1	Resch. 2	Source
Barber	-2.1%	-2.2%	**SMR at 170, ¶¶ FF18-FF19**
Brunell	1.6%	1.89%	**SMR at 170, ¶¶ FF18-FF19**
DeFord	-2.7%	-2.6%	**SMR at 170, ¶¶ FF18-FF19**
Duchin	-2.1%	-2.1%	**SMR at 170, ¶¶ FF18-FF19**[2]

[2] The Special Master's Report finds Dr. Duchin's numbers to be -25.24% and -25.34% respectively, and then suggests her analysis can be discredited because it was an outlier. *See* **SMR at 170, ¶¶ FF18-FF9**; **SMR at 172, ¶ FF26**. However, Dr. Duchin testified at trial that her numbers were a raw number, aggregated from across 12 elections; thus to convert it to a percent, the raw number should be first divided by 12 before converted to a percentage. *See* N.T. 1/27/22 at 455:14-456:12 (Dr. Duchin explaining how to convert chart to a percentage). Thus, the numbers reported in this Brief attributed to Dr. Duchin reflect the division by 12 that she explained at trial.

Rodden	1%	1%	**SMR at 170, ¶¶ FF18-FF19**

As is material to mean-median, in *League of Women Voters*, the Supreme Court noted that in Dr. Chen's simulation of 500 potential plans that relied only on Pennsylvania's traditional districting criteria, the average mean-median gap created by the simulated plans was generally between 0% and 3%, with some plans reaching a maximum of 4%. *See* **SMR at 166**; *see also League of Women Voters*, 178 A.3d at 770, 774. In this matter, Dr. Duchin, like Dr. Chen, also ran simulations, but this time for 100,000 plans using only traditional districting criteria. *See* **SMR at 76, ¶ FF119**; *see also* Duchin Reply Report at 2 (discussing criteria used to create simulations), at 18 (discussing number of simulations). According to her reply report, as elaborated at trial (specifically, with her explanation of how to convert her units of measure to a percentage), no *range* of mean/median results for the simulations were reported, but an average was, which was **-2.39%**. *See* Duchin Reply Report at 4 (Table 3: column three labeled "total meanmedian"; row labeled "ensemble mean"; divided by 12 and multiplied times 100); N.T. 1/27/22 at 455:14-456:12 (Dr. Duchin explaining how to convert chart to a percentage). Her chart reveals that Reschenthaler 1 and 2 both scored a *lower* mean/median average than the 100,000 simulations, with averages of **-2.10%** and **-2.11%** respectively. *See* Duchin Reply Report at 4 (Table 3: column three labeled "total meanmedian"; rows labeled

"Reschenthaler 1" and "Reschenthaler 2"; divided by 12 and multiplied times 100).

(b) Other Methods of Evaluating Partisan Fairness—Seat Counts

According to various experts in this case, the two Reschenthaler maps project to produce a variety of expected outcomes by seat counts (R v. D), though each of the experts reported the information in somewhat different ways (as noted) and based on different elections to simulate the results:

PARTISAN MEASURES BY VARIOUS SEAT COUNTS

Expert	Resch. 1	Resch. 2	Source
Barber	9 D 8 R	9 D 8 R	Barber Reply at 15 (Table 3)[3]
Brunell	5 D 8 R 4 Toss-Up	5 D 8 R 4 Toss-Up	Brunell Report at 8 (Table 9)
DeFord	3 R Safe 5 D Safe 9 Responsive	3 R Safe 5 D Safe 9 Responsive	DeFord Reply at 12 (Table 11)[4]

[3] Dr. Barber's chart reflects "Democratic-leaning" districts. Barber Reply at 15 (Table 3).

[4] Dr. DeFord's chart reports on "safe" districts versus "responsive" districts, which describes where only one party was preferred in that district over 18 elections (a safe district) or where a candidate from each party was projected to be selected (a responsive district).

Duchin	8 D 9 R	8 D 9 R	Duchin Reply Report at 4 (Table 2)[5]
Rodden	6 D 8 R 3 Toss-Up	7 D 8 R 2 Toss-Up	Rodden Reply Report at 9 (Table 5); N.T. 1/27/22 at 171:1-25 (Dr. Rodden)

(c) Political Geography

Pennsylvania's unique political geography affects the analysis of partisan advantage in any proposed map. **SMR at 162, ¶ FF2**. In a 2013 article authored by Dr. Rodden regarding unintentional gerrymandering, his results "illustrate[d] a strong relationship between the geographic concentration of Democratic voters and electoral bias favoring Republicans." *See* **SMR at 162, ¶ FF3**; *see also* N.T. 1/27/22 at 178:22-179:3, 179:23-180:9. Dr. Rodden also concluded in this article that "proving such intent in

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DeFord Reply at 12 (Table 11).

[5] Adding all lines for Reschenthaler 1 or Reschenthaler 2 in Dr. Duchin's Table 2 produces 91 elected Democrats under the projections. Dividing that by the number of elections simulated—12—yields an average of 7.58 Democrats elected. Rounding up, since .58 of a person cannot be elected, the Reschenthaler maps project to elect 8 Democrats in any given election out of 17 possible seats, thus projecting to elect 9 Republicans in any given election (a difference of *just one*).

court will be difficult in states where equally egregious electoral bias can emerge purely from human geography." *See* **SMR at 163, at ¶ FF5**; *see also* N.T. 1/27/22 at 181:6-14. Dr. Rodden believes these statements to be true today about Pennsylvania. *See* **SMR at 163, at ¶ FF6**; N.T. 1/27/22 at 181:18-20.

Dr. DeFord also acknowledges that there is a "partisan advantage to Republicans based on the political geography of the state[,]" so it is "not necessarily a surprise to see a slight tilt favoring Republicans" on the metrics he used. *See* **SMR at 163, ¶ FF7**; *see also* DeFord Initial Report 40, ¶ 104; N.T. 1/27/22 at 291:13-23. Analyzing the 2020 presidential election, Dr. DeFord found that "there is not a part of the state where Republican voters are as heavily concentrated as Democratic voters are in the Philadelphia and Pittsburgh areas." *See* **SMR at 163, at ¶ FF8**; *see also* DeFord Initial Report 40, ¶ 104; N.T. 1/27/22 at 291:24-292:16.

Dr. Duchin's report most compellingly demonstrates the partisan political geography of the Commonwealth. *See* **SMR at 164, ¶ FF9**. In her expert report, Dr. Duchin found that 100,000 randomly drawn districting plans "tend[ed] to exhibit pronounced advantage to Republicans across this full suite of recent elections." *See* **SMR at 164, ¶ FF10**; **SMR at 196, ¶ 38**; *see also* Duchin Initial Report at 18. Dr. Duchin further found in metrics from the partisan symmetry family, including the mean-median score, "random plans favor Republicans," while the Governor's Plan "temper[s] that tendency." *See* **SMR at 164, ¶ FF10**; *see also* Duchin Initial Report at 19.

With regard to partisan fairness and the effect of political geography, Dr. Naughton agrees that nonpolitical issues cause voters and nonvoters to coalesce in certain parts of the state. *See* **SMR at 96, ¶ FF232**; *see also* N.T. 1/28/22 at 696:13-17. Scientific models predicting future elections cannot account for the various factors that contribute to winning an election, including the party of the current president, whether it is a mid-term election, the state of the economy, and campaign fundraising. *See* **SMR at 96-97, ¶ FF233**; *see also* N.T. 1/28/252 at 700-15:24; 701:6-703:8, 704:10-16. Dr. Naughton agrees that scientific models used by Dr. Rodden, Dr. DeFord, and Dr. Duchin do not account for these extraneous factors that contribute to winning an election. *See* **SMR at 97, ¶ FF234**; *see also* N.T. 1/28/22 at 703:9-12. Moreover, running congressional races in Pennsylvania is "very geographical," and certain mapping choices, such as splitting the City of Pittsburgh or splitting Bucks County and Philadelphia can result in losing representation. *See* **SMR at 97, ¶ FF235**; *see also* N.T. 1/28/22 at 713:20-715:24. In Dr. Naughton's expert opinion, there is no perfect variable to put in the equation to create a perfect map because there is going to be subjectivity. *See* **SMR at 97, ¶ FF236**; *see also* N.T. 1/28/22 at 766:6-22.

B. Voting Rights Act

Analyzing the results of the 2012 Presidential election, the 2018 House of Representatives election for District 3, and the 2017 Pennsylvania Supreme Court election, Dr. Brunell conducted a racial bloc voting analysis to determine whether or not a minority-

majority district was required under the Voting Rights Act. *See* Brunell Report at 10. Based on the homogeneous precincts, Dr. Brunell found that the majority of both black and white voters supported the minority candidate, indicating an absence of racially polarized voting. *See* Brunell Report at 10. Looking to ecological regression, Dr. Brunell again found that racially polarized voting is not present. *See* Brunell Report at 11.

The Gressman map has three majority-minority districts. *See* **SMR at 182, ¶ FF4** DeFord Initial Report at 44, ¶ 117. All other maps have two majority-minority districts. *See* **SMR at 182, ¶ FF5**.

C. The "Best Map"

Many experts in this matter offered inconsistent, and thus not credible, testimony regarding which was the "best" map for the Court to choose. Indeed, when asked a near identical question—some version of "which map is best?"—the testimony produced the following answers:

Dr. Rodden (Carter's expert): Carter map, *see* N.T. 1/27/22 at 162:13-20;

Dr. DeFord (Gressman's expert): Gressman map, *see* N.T. 1/27/22 at 284:15-19; and

Dr. Duchin (Governor's expert): Governor's map, *see* N.T. 1/27/22 at 457:2-8.

The testimony was so inconsistent that Dr. Duchin actually stated when told she was the third expert to give a third different answer to the question, "I am sure

that there will be as many opinions as there are experts." *See* N.T. 1/27/22 at 457:9-14.

Dr. Naughton opined, however, that there can be no such thing as a "best map" because that determination is too subjective. N.T. 1/28/22 at 164:25-765:13. Although there can be no best map, in Dr. Naughton's expert opinion, Reschenthaler 1 and Reschenthaler 2 are good maps that would "represent the state well." N.T. 1/28/22 at 772:8-14.

D. Snapshot of the Reschenthaler Maps

The characteristics of Reschenthaler 1 and Reschenthaler 2 can be summarized as follows:

Snapshot of Resch. Maps	**Resch. 1**	**Resch. 2**	**Source**
County Splits	13	13	**SMR at 141, ¶ FF4**; **SMR at 144, ¶ FF21**; **SMR at 145, ¶ FF22**; *see also* DeFord Reply Report at 5, ¶ 14; Duchin Reply Report at 2 (Table 1); Rodden Reply Report at 4 (Table 2); Barber Reply Report at 8 (Table 1); Brunell Report at 4 (Table 3)

County Segments	29	29	**SMR at 141, ¶ FF4**; *see also* Duchin Reply Report at 2 (Table 1); Brunell Report at 4 (Table 3)
Municipal Splits	16	16	**SMR at 141, ¶ FF4**; **SMR at 144, ¶ FF21**; **SMR at 145, ¶ FF22**; *see also* Duchin Reply Report at 2 (Table 1); Barber Reply Report at 8; Brunell Report at 5 (Table 5)
Municipal Segments	33	33	**SMR at 141, ¶ FF4**; *see also* Duchin Reply Report at 2 (Table 1); Brunell Report at 5 (Table 5)
Ward Splits	25	24	**SMR at 144, ¶ FF21**; **SMR at 144, ¶ FF21**; **SMR at 145, ¶ FF22**; *see also* DeFord Reply Report at 7, ¶ 20 (Table 5); Brunell Report at 6 (Table 7)
Ward Segments	50	48	Brunell Report at 6 (Table 7)

Equal Population (Y/N)	Y	Y	**SMR at 138, ¶¶ CL1-CL2**; *see also* DeFord Reply Report at 4, ¶ 13; Duchin Reply Report at 2; Rodden Reply Report at 3; Brunell Report at 1
Contig-uous (Y/N)	Y	Y	**SMR at 137-138, ¶¶ CL1-CL3**; *see also* DeFord Reply Report at 9, ¶ 27; Duchin Reply Report at 2; Rodden Reply Report at 3; Brunell Report at 2
Reock	**a.** 0.435 **b.** 0.4347 **c.** 0.43	**a.** 0.424 **b.** 0.4231 **c.** 0.41	**a.** Brunell Report at 3 (Table 2) **b. SMR at 141, ¶ FF4**; *see also* Duchin Reply Report at 2 (Table 1) **c.** DeFord Reply Report at 9, ¶ 25 (Table 8)

Polsby-Popper	**a.** 0.37 **b.** 0.363 **c.** 0.3629 **d.** 0.35	**a.** 0.36 **b.** 0.352 **c.** 0.3524 **d.** 0.34	**a.** Barber Reply Report at 8 (Table 1) **b.** Brunell Report at 3 (Table 2) **c. SMR at 141, ¶ FF4**; *see also* Duchin Reply Report at 2 (Table 1) **d.** DeFord Reply Report at 9, ¶ 25 (Table 8)
Schwartz	1.6859	1.7127	**SMR at 141, ¶ FF4**; *see also* Duchin Reply Report at 2 (Table 1)
ConvHull	**a.** 0.8238 **b.** 0.81	**a.** 0.8161 **b.** 0.80	**a. SMR at 141, ¶ FF4**; *see also* Duchin Reply Report at 2 (Table 1) **b.** DeFord Reply Report at 9, ¶ 25 (Table 8)
PopPoly	0.7737	0.7658	**SMR at 141, ¶ FF4**; *see also* Duchin Reply Report at 2 (Table 1)

Cut Edges	**a.** 5090 **b.** 5061	**a.** 5237 **b.** 5208	**a. SMR at 141, ¶ FF4**; *see also* Duchin Reply Report at 2 (Table 1) **b.** DeFord Reply Report at 9, ¶ 25 (Table 8)
Retained Population of Prior Map	76.5%	76.5%	**SMR at 185, ¶ FF3**; *see also* Rodden Reply Report at 2
Number of Districts w/ Incumbents Paired	2	1	**SMR at 180, ¶ FF15**; **SMR at 181, ¶¶ FF20-FF21**; *see also* DeFord Reply Report at 21, ¶ 45 (Table 15)
Splits Pittsburgh (Y/N)	N	N	**SMR at 52-53, ¶ FF17**; **SMR at 95, ¶ FF228**; **SMR at 151, ¶ FF18**
Splits Bucks County (Y/N)	N	N	**SMR at 52-53, ¶ FF17**; **SMR at 157, ¶ FF15**

III. ARGUMENT IN SUPPORT OF SPECIAL MASTER'S REPORT

With the exception of two isolated errors—which are likely the byproduct of the expedited nature of the proceedings—the Special Master's factual findings and recommendations are supported by significant record evidence and, thus, should not be disturbed. Similarly, the SMR also ably applies prevailing legal principles to the facts presented relative to: (1) contiguity and compactness; (2) communities of interest; (3) extra-constitutional considerations; (4) the "least change" approach advocated by the Carter Petitioners; and (5) the use of prisoner-adjusted data for redistricting. According, these facts of the SMR's analysis and recommendations should be adopted in full.

A. Inasmuch as the Special Master's factual findings are supported by record, this Court should adopt them.

As explained in *League of Women Voters*, "following . . . grant of extraordinary jurisdiction, [this Court's] standard of review is *de novo*." *League of Women Voters v. Com.*, 178 A.3d 737, 801 n.62 (Pa. 2018) ("*LWV I*"). Nevertheless, this Court has cautioned that a special master's findings of fact must be afforded "due consideration," since "the jurist who presided over the hearings [is] in the best position to determine the facts." *Id.* (quoting *Annenberg v. Com.*, 757 A.2d 338, 343 (Pa. 2000)).[6] Moreover, although the

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[6] *See generally In re Thirty-Fifth Statewide Investigating Grand Jury*, 112 A.3d 624, 633-34 (Pa. 2015) (Baer, J., concurring) ("Special masters operate as an arm of the court, investigating

Court has noted that it ***may*** conduct *de novo* review, as a practical matter, it has rarely (if ever) applied such a standard. *See, e.g.*, *Com. v. Banks*, 29 A.3d 1129, 1135 (Pa. 2011); *In re J.V.R.*, No. 81 MM 2008 (Pa. Mar. 26, 2009) (*per curiam*) (adopting and approving the special master's recommendations); *Com. v. McGarrell*, 87 A.3d 809, 810 (Pa. 2014) (*per curiam*) (accepting the special master's report); *In re Off. of Philadelphia Dist. Att'y*, 244 A.3d 319 (Pa. 2020) (*per curiam*) ("[T]he King's Bench petition is hereby dismissed in accordance with the special master's recommendation."); *see also id.* at 326 (Dougherty, J., concurring statement) (recognizing that a special master's factual findings are afforded "due consideration").

In this regard, this Court's exercise of extraordinary jurisdiction in *Banks* aptly illustrates circumstances that would warrant rejection of a special master's proposed factual findings, as compared against the general rule that such proposed findings are entitled to significant deference. Specifically, in *Banks* this Court exercised jurisdiction and appointed Judge Michael T. Conohan as special master, who was instructed to submit proposed findings of fact and law. Upon receiving Judge Conohan's report, this Court rejected the report, citing his failure to offer "an autonomous judicial expression" and, thus, appointed a different jurist as special master. *Com. v. Banks*, 989 A.2d 1 (Pa. 2009) (*per curiam*). Upon receipt of the second report, this Court expressly rejected the argument that its

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facts on behalf of the court and communicating with it to keep it apprised of its findings[.]").

exercise of extraordinary jurisdiction and subsequent appointment of a trial judge to act as master warranted "a *de novo* standard of review . . . which would be less deferential to the hearing judge." *Banks*, 29 A.3d at 1135. A "circumstantial anomaly" that compels the Court to assume jurisdiction, the *Banks* panel explained, "does not operate to alter the nature of a competency determination, or the respective roles of trial judges and appellate courts." Accordingly, the Court held there was "no need to depart from the settled abuse of discretion standard in reviewing [the special master]'s findings of fact and conclusions of law." *Id.*; *accord Philadelphia Dist. Att'y*, 244 A.3d at 333 (Wecht, J., concurring statement) ("In cases predicated upon the exercise of our King's Bench jurisdiction, we must afford 'due consideration' to supported factual findings***, to which we then apply a de novo standard of review***." (emphasis added)).

Viewed in this light, the Special Master's factual conclusions should be adopted. To begin, save for several minor oversights, her findings are supported by ample record testimony and evidence. Furthermore, insofar as she was required to weigh competing evidence and make credibility determinations, the Special Master's assessment in this respect should not be disturbed absent showing of manifest abuse of discretion. *Accord In re Breyer's Est.*, 37 A.2d 589, 592 (Pa. 1944) ("[F]inding of the master and the court below on this point must be accepted because supported by evidence."). After all, as this Court has recognized, when serving as the special master, "the jurist who presided over the hearings [is] in the best position to

determine the facts." *LWV I*, 178 A.3d at 801 n.62 (quoting *Annenberg*, 757 A.2d at 343).

B. This Court should adopt in full the Special Master's analysis of compactness and contiguity, communities of interest, partisan "fairness," and the "least change" approach.

Although the Congressional Intervenors differ with the Special Master on several discrete points of law, as well as her ultimate recommendation that HB 2146 should be chosen instead of Reschenthaler 1 or 2, they are in full accord with her recommendations in many respects. In particular, four overarching facets of the Special Master's proposed conclusions of law warrant emphasis.

1. The Special Master properly concluded that all of the proposed redistricting plans are sufficiently compact and contiguous.

A central tenet of this Court's decision in *League of Women Voters* was that a congressional redistricting plan must be both compact and contiguous to pass constitutional muster. As that panel explained, these factors—alongside population equality and minimization of split political subdivisions—are neutral benchmarks that "provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of such districts." *LWV I*, 178 A.3d at 817. Under the present circumstances, the Special Master correctly concluded that all of the plans are

sufficiently compact and contiguous and that they are materially indistinguishable in this respect.

Turning initially to compactness, the Special Master found that "[b]ased on the credible testimony and charts provided by Governor Wolf's expert, Dr. Duchin, regarding the metrics used to evaluate compactness, as corroborated by various other experts in their testimony and submissions," all of the proposed "plans and maps fulfill the constitutional requirement that a map be composed of compact territory." SMR at 193, ¶ 22. Because this conclusion was correct as a matter of law and is supported by the record, this Court should decline any invitation to differentiate between the plans based on compactness alone. In this regard, as relayed in the Special Master's submission to this Court, a number of the experts testified that all of the plans "fell within a fairly 'narrow range' of acceptable compactness scores." *Id.* at 60, ¶ FF18 (quoting Rodden Resp. Report at 3; N.T. at 93-94); *see also* SMR, at 79, ¶ FF137. Moreover, all of the experts acknowledged that, because each of the numeric scores are designed to evaluate different aspects of compactness, reliance on any single measurement is ill-advised. *See* SMR, at 60, ¶ FF14; *see also id.* at 70, ¶ FF79.[7]

[7] Notably, the expert testimony in this regard is consistent with the views of a host of scholars in this field. *See, e.g.*, Micah Altman, *The Computational Complexity of Automated Redistricting: Is Automation the Answer?*, 23 Rutgers Computer & Tech. L.J. 81, 131 (1997) (noting that there are "twenty-four quantifications for the goal of 'compactness,' most of which will differ in the values they assign to districts"); *see also* Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness As A Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 346 (1991) (discussing the strengths and weaknesses of the various compactness calculations).

The Special Master's assessment of compactness is also legally sound. To begin, despite directing the General Assembly to enact a remedial congressional redistricting plan to comport with the compactness requirement, in *League of Women Voters*, this Court declined to establish a formulaic standard for compactness and, instead, delineated a range constitutionally permissible outcomes. *See* 178 A.3d at 819 (explaining that in a computer simulation that applied only the traditional redistricting criteria, the appropriate range of scores for an 18-district plan based on the 2010 census data was between .31 and .46 under the Reock measurement, and between .29 and .35 under the Polsby-Popper test).

This approach is also constituent with the plain language of Article II, Section 16 of the Pennsylvania Constitution, which, under *League of Women Voters*, governs the present analysis. Specifically, while that provision requires redistricting plans to avoid splitting counties and political subdivision unless "absolutely necessary," it does not require a plan to achieve ***maximum*** compactness. Indeed, as Charles Buckalew relays in his oft-cited treatise on the Pennsylvania Constitution, the compactness requirement, which first appeared in the State Constitution in 1857, "admits only of approximation to exactness, but good faith alone is required for a substantial execution of the rule of the Constitution." Charles R. Buckalew, *An Examination of the Constitution of Pennsylvania. Exhibiting The Derivation and History of Its Several Provisions*, at 53

(1883).[8] In short, given the multitude of acceptable methods of calculating compactness, as well as the language and structure of the State Constitution, this Court should refuse to draw any material distinctions between the proposals based on compactness.

As it relates to the contiguity requirement, none of the plans were challenged on such grounds and no evidence was offered tending to show that any of the districts were non-contiguous. Accordingly, this Court should adopt The Special Master's finding that, "[o]n their face, and as supported by the evidence of record, all the maps in the proposed plans contain districts that are comprised within a contiguous territory and comply with the contiguity' requirement of the Pennsylvania Constitution." SMR at 192, ¶ 16.

2. The Special Master's factual and legal recommendations relative to communities of interest should be adopted.

This Court should adopt the Special Master's recommendations relative to communities of interest, as they are legally and factually sound. In terms of the Special Master's legal analysis, she correctly concluded that the communities of interest doctrine is rooted in the Free and Equal Elections Clause, as interpreted by *League of Women Voters*.

To begin, as the Special Master recognized, a common thread running through *League of Women Voters* is that, to the greatest degree practicable, a

[8] *Available at* https://www.google.com/books/edition/_/vOWeAQAACAAJ?hl =en&gbpv=1.

congressional redistricting plan should avoid dividing a community with shared interests and concerns. Specifically, this Court's decision in *League of Women Voters* repeatedly emphasized that safeguarding the interests of communities is central to a constitutional analysis of a redistricting plan;[9] in fact, as relayed by the panel, compactness, contiguity, and respect for municipal boundaries were adopted as the as the neutral redistricting benchmarks precisely ***because*** "[t]hese standards place the greatest emphasis on creating 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[.]" *Id.* at 814; *see also Johnson v. Wisconsin Elections Com'n*, 967 N.W.2d 469, 484 (Wisc. 2021) ("[D]rawing contiguous and compact single-member districts of approximately equal population often leads to grouping large numbers

[9] *See LWV I*, 178 A.3d at 816 ("When an individual is grouped with other members of his or her community in a congressional district for purposes of voting, the commonality of the interests shared with the other voters in the community increases the ability of the individual to elect a congressional representative for the district who reflects his or her personal preferences."). Moreover, in evaluating the historic underpinnings that lead to the development of the neutral criteria it prescribed, the Court emphasized that the Free and Equal Elections Clause, in its original form, provided that "all elections ought to be free; and that all free men having a sufficient evident common interest with, and ***attachment to the community***, have a right to elect officers, or to be elected into office." *Id.* (quoting Pa. Const. of 1776, art. I, § VII) (emphasis added); *see also id.* ("[I]t is evident that [our founders] considered maintaining the geographical contiguity of political subdivision, and barring the splitting thereof in the process of creating legislative districts").

of Democrats in a few districts and dispersing rural Republicans among several. These requirements tend to preserve communities of interest, but the resulting districts may not be politically competitive—at least if the competition is defined as an inter-rather than intra-party contest.").

Accordingly, although compactness, contiguity, and respect for municipal boundaries, are undoubtedly the primary tool for evaluating the constitutionality of a redistricting plan, properly understood these principles serve to advance the Free and Equal Elections Clause's overarching goal of protecting the interest of communities. While not susceptible to the precise mathematic measurement, this Court has recognized that the term "communities of interests" encompasses, among other things, "school districts, religious communities, ethnic communities, geographic communities which share common bonds due to locations of rivers, mountains and highways[.]" *Holt v. 2011 Legislative Reapportionment Com'n*, 38 A.3d 711, 746 (Pa. 2012) ("*Holt I*"). This concept may also refer to a community's "circulation arteries, its common news media … its organization and cultural ties[,]" its "common economic base[,]" and the relationship among "schools of higher education as well as others." *Mellow v. Mitchell*, 607 A.2d 204, 220-21 (Pa. 1992).

Applying the foregoing settled framework, the Special Master highlighted two recurring features that—based on Dr. Naughton's detailed and unrebutted testimony—she found evince a plan's disregard for communities of interest: (1) splitting the City of Pittsburgh, and (2) splitting Bucks County.

Because the Special Master's assessment of the communities of interest is grounded in this Court's precedent and supported by ample record evidence, this Court should adopt her recommendations insofar as they relate to the various submissions' attention to communities of interest; i.e., insofar as any given plan splits Pittsburgh or Bucks County, that plan should be discounted and set aside.

3. The Special Master's assessment of partisanship in the redistricting plans should be adopted.

A central—if not overriding—theme in most of the briefing in support of the proposed maps submitted by the parties and *amici* is each plan's partisan breakdown. Carefully examining the competing arguments, the Special Master concluded that, as a matter of law, partisan considerations in redistricting—regardless of the label attached to them—must yield to the neutral criteria identified above (*i.e.*, equal population, compactness, contiguity, and respect for political boundaries). In this regard, given that numerous experts credibly testified that a redistricting plan principally guided by the constitutionally derived neutral factors would produce a pronounced Republican advantage in terms of likely electoral outcomes, the Special Master found that any plan which ***expressly*** sought to alter this natural state of affairs—namely the proposals submitted by the Gressman Petitioners, Governor Wolf, and Draw the Lines *amici*— improperly subordinated partisan considerations to the neutral benchmarks established by this Court in *League of Women Voters*. Because

these conclusions are consistent with the Free and Equal Elections Clause, as interpreted by this Court in *League of Women Voters*, and supported by ample record evidence, the Special Master's recommendations in this respect should be adopted.

In terms of the controlling legal principles, the Special Master accurately relayed this Court's admonition that while other factors, including political considerations, may continue to play a role in the redistricting process, the Free and Equal Elections Clause requires them to be "wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts." *LWV I*, 178 A.3d at 817. Accordingly, the Special Master rejected the argument that the Free and Equal Elections Clause requires a redistricting plan to be fashioned in such a way that it will allow the party whose candidates, on average, garner the majority of the statewide share of the vote, to also win a majority of the congressional districts.

The Special Master's cogent analysis in this regard should be adopted, as it is consistent with this Court's interpretation of the Free and Equal Elections Clause, as well as its precedent in the redistricting context. In terms of the constitutional requirements, as aptly summarized in *League of Women Voters*, the Free and Equal Elections Clause prohibits "subordinat[ing] the traditional redistricting criteria in the service of partisan advantage." 178 A.3d at 818. A plan designed to overcome a partisan *disadvantage* that exists because of neutral factors, is necessarily is "in the

service of partisan advantage." *Id.* Moreover, this Court has previously considered—and expressly rejected—proportionality as a valid principle. Specifically, emphasizing that compactness, contiguity, and respect for political subdivisions are the paramount goals in redistricting, the *Holt* panel admonished that "[t]he constitutional reapportionment scheme does not impose a requirement of balancing the representation of the political parties; it does not protect the 'integrity' of any party's political expectations." *Holt v. 2011 Legislative Reapportionment Com'n*, 67 A.3d 1211, 1235 (Pa. 2013) ("*Holt II*"). Instead, the panel explained, "the construct speaks of the 'integrity' of political subdivisions, which bespeaks history and geography, not party affiliation or expectations." *Id.*; *see also Johnson*, 967 N.W.2d at 484.

In short, the Special Master's recommendation relative to proportionality in the context of redistricting is firmly rooted in this Court's precedent and predicated on a robust factual record. Thus, the analysis should be adopted by this Court.

4. Because the "least change" approach does not afford sufficient attention to the neutral criteria under the Free and Equal Elections Clause, it should be rejected.

Consistent with the Special Master's recommendations, this Court should also reject the "least-change" principle urged by the Carter Petitioners.

First, in *League of Women Voters*, this Court made clear that "the preservation of prior district lines" is a

factor that must be "wholly subordinate to the neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts." 178 A.3d at 817. Notwithstanding *League of Women Voters*'s clear directive, the Carter Petitioners' expert witness and map-maker, Dr. Rodden, relayed that this consideration, which he described as the "least-change approach," was his ***central*** focus in reconfiguring Pennsylvania's congressional map. *See* SMR at 184, ¶¶ FF1. The fact that the Carter Petitioners' primary motive was minimizing changes to the extant redistricting plan, rather than adherence to the neutral redistricting criteria is—without more—sufficient grounds for summarily rejecting the Carter Petitioners' plan.

Moreover, this Court has been particularly skeptical of this approach, cautioning that "the notion that the Constitution independently, and tacitly, commands special respect for prior districting plans or incumbencies can be a mischievous one." *Holt II*, 67 A.3d at 1234. Specifically, the Court recognized that this approach, in practice, is a thinly-veiled argument for entrenching incumbents and the existing political interests:

> In the [Legislative Reapportionment Commission]'s view, upheaval or uncertainty in the electoral process must be avoided, and "historical" legislative districts should be preserved out of respect for the choices of the voting public and in the interest of efficiency. However, we are not so naïve as not to recognize

> that the redistricting process may also entail an attempt to arrange districts in such a way that some election outcomes are essentially predetermined for voters—"safe seats" and the like.

Id. at 1235. Notably, in reaching this conclusion, the Court also explained that *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)—which the Carter Petitioners cite as authority in their brief—was wholly inapposite, noting that "the Court [in Karcher] was not speaking of 'inherent' constitutional considerations under Pennsylvania state law, or under any state constitution for that matter." *Holt II*, 67 A.3d at 1234.

5. This Court should adopt the Special Master's recommendation that a redistricting plan based on prisoner-adjusted data does not comport with the constitutional requirements for equal population.

The Special Master correctly concluded that a proposed redistricting plan which attempts to count incarcerated individuals at their home address rather than their prison address violates the oneperson, one-vote requirement for congressional districting.

In redistricting, states must comply with the one person, one vote principle by "designing districts with total equal populations," *Evenwel v. Abbott*, 578 U.S. 54, 71 (2016), which ensures equality of representation for equal numbers of people. *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964). Traditionally, states use census numbers as the basis for populations. *Evenwel*, 578

U.S. at 73 (noting that adopting voter-eligible population as the basis for apportionment would "upset a well-functioning approach to districting that all 50 states and countless local jurisdictions have followed for decades, even centuries"). Using census numbers for redrawing congressional districts is consistent with the fundamental understanding that elected officials represent all residents, regardless of their voter eligibility. *Id.* at 74. Relying upon the principles articulated in *Evenwel*, the First Circuit has found that including prisoners as population in the ward where they are incarcerated does not raise a constitutional concern. *Davison v. City of Cranston*, 837 F.3d 135 (1st Cir. 2016). The First Circuit rejected the argument that inclusion of prisoners in the apportionment constituted vote dilution to those outside the district in question, emphasizing that the status quo is to base apportionment on census data. *Id.* at 144.

The Ali *amici*, who use this adjusted data set, place mistaken reliance upon Section 1302 of the Election Code for doing so. Section 1302 defines the residence of incarcerated electors for election purposes as the place where they were last registered to vote prior to incarceration. 25 Pa.C.S. § 1302. An individual's voter registration address does not necessarily correspond to the individual's residence for census purposes and thus does not warrant readjusting the data upon which the maps are drawn. College students, for example, are counted for census purposes in the places where they attend college, but may maintain a different voter registration address. Counting incarcerated individuals in their place of incarceration is consistent with the census and with the one-person, one-vote principle, and

is not invalidated by 39 Section 1302 of the Election Code. Indeed, Pennsylvania's consistent and traditional approach to counting incarcerated individuals where they are incarcerated for congressional redistricting is the majority view across the country.[10]

In light of the foregoing, Judge McCullough concluded that the Ali plan's compliance with the one-person one-vote requirement must be assessed under the unadjusted census data used by all of the remaining parties, which resulted in a deviation of over 8,500 people. Because such a discrepancy violates the one-person, one-vote principle, Judge McCullough recommended that this Court reject the proposed redistricting plan submitted by the Ali *amici*.

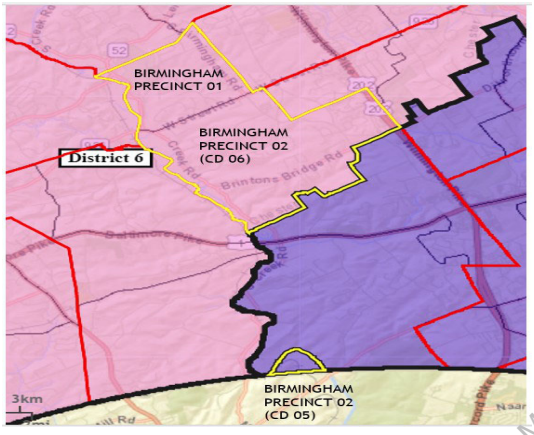
As reflected in the foregoing discussion, Special Master's analysis of this issue comports with controlling legal precepts and, thus, should be adopted.

[10] Washington, Nevada, California, Colorado, Virginia, Maryland, and New Jersey are the only states that adjust census data to account for prisoners in home districts in congressional districting and do so pursuant to state statute. *See* Cal. Elec. Code § 21003; Colo Rev. Stat. § 2-2-902; Md. Elec. Law § 8-701; Nev. Rev. Stat. § 360.288; N.J.S.A. 52:4-1.1 – 1.6; Va. Code Ann. § 24.2-304.04; Wash. Rev. Code § 44.05.140. *See also Davidson*, 837 F.3d at 144 (noting that the decision whether to include or exclude prisoners in apportionment "is one for the political process").

IV. ARGUMENT IN SUPPORT OF EXCEPTIONS TO SPECIAL MASTER'S REPORT

A. The Special Masters' Report errs in concluding the Carter map has 13 county splits instead of 14 county splits.

Whether the Carter map splits 13 or 14 Counties comes down to an issue somewhat familiar to this Court, but which, under the facts now present, should generate a different finding. To explain, in adopting the 2018 Remedial Plan, this Court posted a footnote explaining that even though the Plan technically split Chester County due to a zero-population segment of Chester located within Delaware County, the Court would not consider that a split. *See League of Women Voters v. Com.*, 181 A.3d 1083,1088 n.10 (Pa. 2018) (*"LMV II"*). The proposed Carter map likewise has that same issue, specifically regarding Birmingham Township, precinct 02, which is a noncontiguous portion of that municipality bordering the state of Delaware, shown immediately below (from the Carter map, showing Birmingham in proposed districts five and six). The Carter Petitioners argued to the Special Master that this split should not be construed as a split at all, *see* Carter Pet. Proposed Findings of Fact and Conclusions of Law at 30 n.1 (Jan. 29, 2022), and the Special Master appeared to agree. *See* SMR at 143, ¶ FF7.



This proposed finding of the SMR should be rejected for at least two reasons. *First*, while this particular segment of Chester County in 2018 had no population, and thus was essentially a mere parcel of land, it now has six reported inhabitants. *See* Carter Pet. Proposed Findings of Fact and Conclusions of Law at 30 n.1. This rightly justifies now considering that small segment of population part of Chester County for "splits" purposes, since those six persons are residents of Chester County. *Second*, multiple experts construed the Carter map as having 14 county splits, including the Carter Petitioners' *own expert* in his reply report. *See* Rodden Reply Report at 4 (Table 2); N.T. 1/27/2022 at 166: 3-9 (Dr. Rodden discussing Table 2); *see also* DeFord Reply Report at 5 (Table 2); Duchin Reply Report at 2 (Table 1). Thus, the factual record supports finding this division to be a county "split" for purposes of this Court's analysis.

Accordingly, the Court should find that Reschenthaler 1 and Reschenthaler 2 are the *only* maps before the Court that split just 13 counties.

B. The Special Master's Report errs in concluding that all of the plans satisfy the equal population requirement of the United States Constitution.

The Special Master erred in concluding that all of the proposed plans satisfy the equal population requirement of the United States Constitution for at least two reasons. *First*, while the SMR correctly observes that a total population deviation of up to 10% is permissible in the context of state or local districts, the population equality requirements are far more stringent for ***congressional*** redistricting plans. *Second*, court-ordered congressional plan are held to an even more stringent standard. Examining the plans through the proper lens, this Court should reject the plans submitted by the House Democratic Caucus and the Carter Petitioners without further inquiry, as they are constitutionally infirm.

To explain, in concluding that all of the redistricting proposals, with the exception of the prison-adjusted plan submitted by the Ali amici, satisfy the equal population requirement, the Special Master relied on the general principle that "[w]here the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a state or local legislative map presumptively complies with the one-person, one-vote rule." *Evenwel v. Abbott*, 578 U.S. 54, 60 (2016). As *Evenwel* itself notes, however, congressional districts are judged by a different standard. *See id.* (observing that while "[s]tates must draw congressional districts with populations as close to perfect equality as possible[,] … when drawing state

and local legislative districts, jurisdictions are permitted to deviate somewhat"); *Mahan v. Howell*, 410 U.S. 315, 321 (1973) (explaining that "more flexibility [is] constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting"), *modified*, 411 U.S. 922 (1973). Specifically, Article I, Section 2 of the United States Constitution "establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers of people.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). Indeed, "[t]he Supreme Court has been exceedingly clear in requiring lower courts to balance population among the districts with precision." *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675 (M.D. Pa. 2002) (holding 19- person total deviation violated the Federal Constitution's one person, one vote requirement).

While courts have recognized that mathematical precision is not always achievable, the "nearly as practicable" standard require "'the State make a good-faith effort to achieve precise mathematical equality." *Karcher*, 462 U.S. at 730.

A challenge to a plan's equal population involves two inquiries. *First*, the party challenging the redistricting plan bears the initial burden of "proving the existence of population differences that 'could practicably be avoided.'" *Tennant v. Jefferson Cty. Com'n,* 567 U.S. 758, 760 (2012) (quoting *Karcher*, 462 U.S. at 734). Second, if this burden is met, the burden shifts to the State "to show with some specificity that the population differences were necessary to achieve

some legitimate state objective." *Id.* To meet its burden, "the State must justify each variance, ***no matter how small***." *Karcher*, 462 U.S. at 780 (emphasis added). Importantly, "there are no de minimis population variations, which could practicably be avoided, but nonetheless meet the standard of [Article I, Section 2] without justification." *Id*. at 734.

Moreover, this standard—which, as the discussion above demonstrates, is quite exacting in its own right—is even more stringent when a redistricting plan is implemented by court order, rather than by legislative action. *See Abrams v. Johnson*, 521 U.S. 74, 98 (1997) ("Court-ordered districts are held to higher standards of population equality than legislative ones."); *Navajo Nation v. Arizona Indep. Redistricting Com'n*, 230 F. Supp. 2d 998, 1009 (D. Ariz. 2002) ("A court-ordered plan is held to an even stricter *de minimis* standard of population equality than one drawn by a state legislature.").

Against this backdrop, the Special Master erred in concluding that the plans submitted by the Carter Petitioners and the House Democratic Caucus pass constitutional muster, despite containing a two-person deviation. Although this action is not, strictly speaking, a challenge under Article I, Section 2 of the United States Constitution's equal population requirement, *Karcher*'s two-prong test is nevertheless instructive.

Thus, turning to the first part of the test, there is no doubt that the population difference in the Carter and House Democratic Caucus proposals "could practically be avoided[,]" 462 U.S. at 734, since ten of the thirteen maps submitted to the Special Master ***did*** avoid such

a discrepancy. With regard to the second part of the inquiry, neither plan can credibly justify its deviation as necessary to achieve some "legitimate state objective." As it pertains to the House Democratic Caucus' plan, they did not even attempt to justify their failure to achieve population equality and, in fact, they were the only party that failed to offer any testimony—expert or otherwise. Similarly, the Carter Petitioners have not established that such a population deviation is necessary to advance a compelling state interest. Indeed—aside from being remarkable in that it is one of only two plans to violate the core precept of "one person one vote"—the Carter plan is remarkable in no other way. For example, it is not (and does not purport to be) the most compact, the most contiguous, or the most respectful of political subdivisions and municipalities.

Furthermore, to the extent the Carter Petitioners intend to argue that their non-compliance with Article I, Section 2 of the United States Constitution is warranted because of their "least change" approach to redistricting, that argument is unavailing. Specifically, as explained elsewhere in this Brief, maintenance of the core of a district is—at most—a secondary consideration that is wholly subordinate to the constitutionally prescribed neutral criteria. Accordingly, whatever role "the least" change rubric may have in the process, it is certainly not the type of "consistently applied legislative policies [that] might justify some variance," *Tennant*, 567 U.S. at 761-62 (internal quotation marks omitted), since it is neither a "legislative polic[y]," nor has it been "consistently

applied." To the contrary, under *Holt*, reliance on this consideration is strictly circumscribed.

In short, a ***one*** person deviation is "as nearly as practicable" to equal population, and adhering to this deviation did not preclude the Carter Petitioners or the House Democrats from complying with the other constitutionally required redistricting criteria. It is manifest, therefore, that no compelling interest required the unconstitutional deviation.

C. The Special Master's Report errs in its analysis of the interplay between Fourteenth Amendment's prohibition against racial gerrymandering and the Voting Rights Act.

Although arguably not erroneous as such, the Special Master's analysis of the Federal Voting Rights Act, *see* 52 U.S.C. §§ 10301, *et seq*. (the "VRA"), is incomplete in several material ways. At bottom, the question before the Special Master—and now this Court—is not whether any of the proposals comply with or violate the VRA, but rather, whether some of the plans have been constructed with an impermissible emphasis on race. As explained below, where the *Gingles* factors have not been satisfied, constructing a plan with an emphasis on race—regardless of subjective intent—risks running afoul of the United States Constitution's prohibition against racial gerrymandering. Viewed in this light, the Special Master should have rejected the plans offered by the Governor, the Gressman Petitioners, and the Senate Democrats because the required record to complete a VRA and constitutional analysis of each is lacking (i.e.,

whether each plan does or does not violate the VRA and/or the Fourteenth Amendment is presently unknown, thus each should have been rejected).

1. The VRA and the Fourteenth Amendment.

As a prefatory matter, it is important to emphasize that there are two separate strands of federal law relating to racial gerrymandering. First, under Section 2 of the VRA, a state may be required to draw a majority-minority district if the three *Gingles* factors are satisfied. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). Specifically, such a redistricting plan is mandatory if: "(1) [t]he minority group must be 'sufficiently large and geographically compact to constitute a majority in a single-member district,' (2) the minority group must be 'politically cohesive,' and (3) the majority must vote 'sufficiently as a bloc to enable it … usually to defeat the minority's preferred candidate.'" *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (quoting *Gingles*, *supra* at 50-51).

A distinct, but closely-related line of cases pertain to racial gerrymandering under the Fourteenth Amendment, which prohibits states from drawing district lines on the basis of race absent a ***compelling interest***. Of course, given that compliance with federal law is presumptively "a compelling interest," where the VRA requires creation of a majority-minority district, a claim of racial gerrymandering is unlikely to succeed. *See Abbott v. Perez*, 138 S. Ct. 2305 (2018) ("[T]he Court has assumed that compliance with the VRA is a compelling State interest for Fourteenth Amendment purposes[.]"). But where the VRA does not require

creation of a majority-minority district, a State must proffer a "significant reason" for drawing district lines based on race. Therefore, if one of the *Gingles* factors, such as white bloc-voting, cannot be established, then the requisite good reason for drawing a minority-majority district does not exist. *See Gingles*, 478 U.S. at 49 n.15 (noting that "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters").

2. The proposed plans of Governor Wolf, the Gressman Petitioners, and the Senate Democrats.

In this matter, Dr. Brunell's unrebutted expert report demonstrates that there is no racially polarized voting in Philadelphia County, which forms the core of all of the districts in question. Despite the absence of racially polarized voting in Pennsylvania, Governor Wolf, the Gressman Petitioners, and the Senate Democrats have created three districts that attempt to achieve a certain racial composition.[11]

For instance, in their submissions to the Special Master, the Senate Democrats make a passing reference to *Gingles*, *see* Senate Democrats' Br. at 10, but did not even mention, let alone develop, any of the three factors. Nor did their expert's report suggest that this this analysis had been undertaken, and the expert

[11] Congressional Intervenors do not dispute that one of the districts is, by virtue of Philadelphia's geography and demographics, likely to be a majority-minority district based on the application of the neutral criteria outlined in *League of Women Voters.*

did not offer any testimony in this respect. The Senate Democrats cited *Bartlett* (again in passing, and without pinpoint citation) in support of drawing coalition districts; however, *Bartlett* did not consider a coalition district. *See Bartlett*, 556 U.S. at 13-14 (distinguishing between "crossover districts"—where minority and majority voters vote for a minority candidate—and "coalition districts" where "two minority groups form a coalition to elect a candidate" of that coalition's choice, and expressly stating "[w]e do not address … coalition district[s] here"). And, even if *Bartlett* supported drawing coalition districts, the Senate Democrats would still be required to prove all three *Gingles* factors, which in the context of a coalition district requires the State to show that the minority group votes as a sufficiently cohesive unit. But they did not. And that flaw casts significant doubt on the constitutionality of their proposal.

Similarly while the Governor and the Gressman Petitioners suggest that *Gingles* applies, their experts did not—and, as Dr. Brunell's report demonstrates, *could* not—establish that the third factor is satisfied. Notably, as well, while the Governor (and to some extent, the Senate Democrats) occasionally downplay their emphasis on race in drawing the districts, the Gressman Petitioners have advocated for their map precisely ***because*** it is able to pack more minority groups into the three districts than any other proposal. *See* SMR at 121.

Because the Governor, the Senate Democrats, and the Gressman Petitioners did not prove *Gingles* is met, and acknowledged that their plans were drawn (at

least in part) to achieve certain racial compositions in the districts, the only way to withstand a challenge under the Fourteenth Amendment would be a showing of some other "significant reason" (beyond compliance with the VRA) for drawing district lines based on race. These particular plans fail on this score as well.

In *Shaw v. Reno*, 509 U.S. 630 (1993), the High Court concluded that a race-neutral redistricting plan, which separates voters into separate districts based predominantly on race, violates the Fourteenth Amendment when "that separation lacks sufficient justification." *Id.* at 650. While the Court acknowledged that racial gerrymandering cases might be difficult to prove, but noted in "some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race[,]" the *Shaw* court offered a scenario where "a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions." *Id.* at 646; *see also id.* (these objective factors are important because "they may serve to defeat a claim that a district has been gerrymandered on racial lines"). As aptly relayed by the Court, grouping together individuals who share a common race, but no other commonality— geography, political boundaries, etc.—"reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We

have rejected such perceptions elsewhere as impermissible racial stereotypes." *Id*. These concerns are even more pounced where the plans at issue have prioritized the amalgamation of different races simply because they are not white.

To summarize, whether the plans discussed above actually violate Federal law is unclear and that question is not properly before the Court. Indeed, absent discovery and access to the mapmakers and the process utilized for creating the plans proposed by these parties, it would be nearly impossible to definitively make an assessment on this point at this juncture. What is clear, however, is that these plans, if adopted, will face questions that may result in their invalidation in Federal Court. Regardless, they should have been rejected by the Special Master due to the incomplete record.

D. The Special Master's Report errs in the interpretation of the prohibition against splits of counties and municipalities unless "absolutely necessary."

In evaluating the various plans, the Special Master did not accord sufficient legal weight to the prohibition against splitting municipalities and municipalities unless "absolutely necessary." Specifically, although the Special Master recognized that the prohibition against splitting counties and municipalities is one of the core neutral benchmarks under *League of Women Voters*, the SMR's analysis in this regard was flawed in two important ways: *first*, it misinterpreted this directive as simply one of the factors that is weighted in the analysis; and *second*, it mistakenly placed wards

on the same footing as counties and other political subdivisions. As explained below, the text, structure, and history of the State Constitution suggest that minimizing county and municipal splits is a paramount objective that is second only to the equal population requirement. Furthermore, consistent with the rules of textual interpretation, Article II, Section 16's reference to "wards" should be given less weight.

1. Article II, Section 16.

As the Special Master recognized, in *League of Women Voters* this Court held that the neutral criteria articulated in Article II, Section 16 of the State Constitution properly governed its assessment of congressional redistricting plans. The full text of that provision is as follows:

> The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. ***Unless absolutely*** necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

Pa. Const. art. II, § 16 (emphasis added). Explaining that this provision is deeply rooted in the Commonwealth's constitutional history and is an outgrowth of the various efforts aimed at preventing voter dilution, the Court incorporated its three core

requirements: (1) compactness; (2) contiguity; and (3) the prohibition against splitting political subdivisions "[u]nless absolutely necessary." While the phrase "absolutely necessary" was not further developed in *League of Women Voters*, the debates of the 1968 Pennsylvania Constitutional Convention, as well as the interpretation of the United States Constitution, suggest that strict emphasis on keeping counties and political subdivisions whole is a central part of our organic law.

To illuminate, from the inception of the 1968 Convention, the delegates plainly regarded the maintenance of political boundaries as an overriding concern. Indeed, on the opening day, when the question of implementing certain guidelines in the legislative reapportionment process was first raised, Mr. Stahl offered the following remarks:

> The maintenance of political subdivision boundary lines is the principal non-population factor sanctioned by the courts. This can be accomplished by separate representation for local government units, or by preventing the splitting up of political subdivisions in the formation of legislative districts. The Supreme Court has recognized that the establishment of legislative districts along political subdivision lines may also serve to deter gerrymandering.

Debates of the Convention to Amend the Constitution of Pennsylvania, Vol. I at 32 (1967).

And the best evidence that the word "absolutely" was intended to elevate this requirement is found in

the procedural history of the particular phrase. Specifically, after extensive debate—and before a final vote—an amendment regard it was referred to the Convention's Committee on Style and Drafting. With the input of the Substantive Committee on Redistricting, the Chairman of the Committee on Style and Drafting specifically stated "[t]he Committee acquiesces in the substantive committee's insistence upon the inclusion of the adverb 'absolutely[,]'" *Debates of the Convention to Amend the Constitution of Pennsylvania*, Vol. II at 1161 (1968). Thus, in addition to the settled maxim that every word in the Constitution must be given effect, the "substantive committee's instance upon" the included adverb suggests an intent by the framers of the present version of our Constitution to create organic law that is more forceful than one where the word "necessary" stands alone.

Furthermore, a case that is familiar to every first-year law student also confirms the heightened emphasis that should be placed on "absolutely necessary." Specifically, examining the meaning of the word "necessary" as used in the Necessary and Proper Clause, the U.S. Supreme Court explained that the word "standing by itself, has no inflexible meaning; it is used in a sense more or less strict, according to the subject." *M'Culloch v. State*, 17 U.S. 316, 388 (1819). The Court further observed, however, that this word "may be qualified by the addition of adverbs of diminution or enlargement, such as very, indispensably, more, less, or absolutely necessary[.]" *Id.* In this regard, the Court pointed to Article I, Section 10, which "prohibits a state from laying

'imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws[.]" U.S. Const. art I, § 10. While the Necessary and Proper Clause granted flexibility, Justice Marshall explained, Article I, Section 10's prohibition was decidedly more stringent, since "the convention understood itself to change materially the meaning of the word 'necessary,' by prefixing the word 'absolutely.'" *M'Culloch*, 17 U.S. at 414-15.

The foregoing leads to the inescapable conclusion that the prohibition against dividing counties and municipalities requires particularly close attention when redistricting under Pennsylvania law. The question, then, is what constitutes absolute necessity? The only logical conclusion is that such a division is appropriate where it is absolutely necessary to comply with another clear constitutional directive. Accordingly, in the present context, this directive can be read as mandating a strict regard for county and municipal boundaries, unless splitting them is necessary to comply with the equal population requirement.

2. Wards.

Because the nature of "wards" has changed drastically over the last century, the Special Master erred in placing equal legal weight on ward divisions. Specifically, at the time this constitutional provision was adopted, wards were an essential municipal unit within boroughs and cities of the Second and Third Class. Among other things, each ward elected its own officers, such justice of the peace, aldermen,[12]

[12] Pa. Const. of 1874, art. V, § 11 provided:

assessors,[13] and auditors. Moreover, given that municipal legislative bodies had not yet been made subject to equal population requirements, members of borough council were elected by ward. Wards, therefore, were integral to the municipal structure.

Over time, however, that began to change, beginning with the abolition of aldermen and justices of the peace.[14] Furthermore, as the population distribution among wards continued to become more lopsided and the application of one-person-one-vote

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> Except as otherwise provided in this Constitution, justices of the peace or aldermen shall be elected in the several wards, districts, boroughs and townships, at the time of the election of constables, by the qualified electors thereof, in such manner as shall be directed by law, and shall be commissioned by the Governor for a term of five years. No township, ward, district, or borough shall elect more than two justices of the peace or aldermen without the consent of a majority of the qualified electors within such township, ward, or borough; no person shall be elected to such office unless he shall have resided within the township, borough, ward or district for one year next preceding his election. In cities containing over fifty thousand inhabitants, not more than one alderman shall be elected in each ward or district.

[13] *See, e.g.*, 72 P.S. §§ 5020-102 (defining the role of assessors); 72 P.S. § 5020- 301 ("The qualified voters of each ward in cities of the third class shall, at the municipal election in the year one thousand nine hundred and thirty five, and every four years thereafter, vote for and elect a properly qualified person, according to law, to act as county assessor in each of said wards under the provisions of this act, who shall serve for four years."), *repealed by* 53 Pa.C.S. § 8801 *et seq*.

[14] *See* Pa. Const. Sched. art. V, § 12 (abolishing office of alderman and justice of the peace).

principles to local reapportionment was firmly established, boroughs and cities also ceased elected council members by ward and, instead, either shifted to at-large representation, or decennial districting. At present, one of the only function wards serve is in the election administration process.[15] Thus putting splits of wards on equal footing as splits of counties and municipalities in assessing redistricting plans is unjustified.

E. The Special Master erred in recommending HB 2146 over Reschenthaler 1 or 2.

In the end, this case comes down to "absolutely necessary." Here, the ***only*** maps before the Court that have split counties and municipalities the least number of times (13 and 16 respectively)—i.e., only as absolutely necessary—are Reschenthaler 1 and Reschenthaler 2. Multiple experts (Dr. Rodden, Dr. DeFord, and Dr. Duchin), none of whom were experts for the Congressional Intervenors, testified that it was absolutely possible to draw a 17-district congressional map that contained only 13 county splits and 16 municipal splits, just as the Congressional Intervenors have done. *See* SMR at 147, ¶¶ FF42-FF43; *see also* N.T. 1/27/22 at 43:19-25; 170:15-20 (Dr. Rodden); N.T. 1/27/22 at 287:11-20 (Dr. DeFord); N.T. 1/27/22 at 461:5-21 (Dr. Duchin). Here's what that means: a

[15] The only remnant of the old regime of ward officers appear to be constables. *See* 44 Pa.C.S. § 7113(b) ("The qualified voters of every borough divided into wards shall vote for and elect a properly qualified person for constable in each ward and a properly constable for high constable in the borough.").

congressional plan for Pennsylvania **cannot** contain more than 13 county splits or 16 municipal splits because multiple experts admitted splitting more than that was not absolutely necessary to achieve constitutional compliance.

That should be the end of the inquiry for this Court. The Congressional Intervenors are the only participants in this proceeding who *to the letter* followed the Pennsylvania Constitution. While others submitted maps that have this or that feature purporting to be better in some one way or other, those maps all fail for the same reason: they split more counties and municipalities than is "absolutely necessary." Thus, comparing their various metrics to those of the Congressional Intervenors' maps is a comparison of apples to oranges: none of them presented testimony, and thus it is utterly unknown, how they would have fared in these metrics had they followed the Constitution. N.T. 1/27/22 at 465:16-25 (Dr. Duchin testifying).[16] Even if the Court could consider maps with higher numbers of splits, consideration of all neutral factors compels selecting one of the Reschenthaler maps: they are top of the class in compactness scores, share the least amount of municipal splits and segments, and of course stand

[16] Q. So your representation to the Court is if these maps changed or produced fewer county splits, the scores don't change?
A. They might remain unchanged.
Q. They might remain unchanged, but they might change?
A. But they might change.
Q. Indeed.
A. I agree.
N.T. 1/27/22 at 465:16-25.

alone with fewest county splits and segments. No other map checks as many of the neutral factor boxes as the Reschenthaler maps. Accordingly, the other parties' stats, and the maps themselves, should be summarily ignored.

Finally, various experts reported a variety of purported partisan measures about each of the *submitted* maps, but the most resounding detail was about ones *not* submitted. Indeed, Dr. Duchin—the Governor's expert—disclosed to the Court that in generating **100,000** random plans (i.e., maps) with a computer, which was programmed only to honor Pennsylvania's minimum constitutional requirements, the "[r]andom plans tend to exhibit **pronounced advantage** to Republicans across this full suite of elections." *See* Duchin Initial Report at 18 (emphasis added); SMR at 164, ¶ FF10. And that wasn't a typo; indeed, on the next page of her report, still analyzing the 100,000 plans drawn by a non-partisan, non-biased computer, she once again concluded that "random plans favor Republicans[.]" Duchin Initial Report at 19. Further, far from backing away from this analysis, at trial she agreed that these 100,000 plans produced a "pronounced advantage to Republicans." N.T. 1/27/22 at 449:1-12.[17]

[17] Q. Now, as I understand what you're saying is that you agree that the random plans that are drawn in your ensemble without any partisan data, Exhibit A, pronounced advantage to Republicans. Correct?

A. That's a qualitative assessment, but I would call this pronounced.

Q. You would call it pronounced?

A. I would.

N.T. 1/27/22 at 449:1-12 (testimony of Dr. Duchin).

In other words, the most "typical outcome" for any randomly drawn, constitutionally compliant plan, which takes no account for impermissible partisan considerations, is one that will produce a Republican "tilt" based on election projections. N.T. 1/27/22 at 450:10- 10-16 (Dr. Duchin testifying).[18] And the *reason* for that typical outcome is not anything nefarious but, in fact, something readily acknowledged at trial: Pennsylvania's human geography (sometimes referred to as political geography) results in its citizens living in population-dense urban areas, which are more Democrat, and also in population-dispersed rural areas, which are more Republican. *See* SMR at 162-164, ¶¶ FF1-FF10; *see also* N.T. 1/27/22 at 174:3-181:24 (Dr. Rodden testifying);); Duchin Initial Report at 17 ("In this section, I present a series of images that reinforce the theme elaborated above: the political geography of Pennsylvania creates a districting landscape that is tilted toward Republican advantage.")[19] Thus, in drawing population-equal

[18] Q. But the most typical outcome is plans with a Republican tilt. Fair?
A. Absolutely. And I'm not aware of any rule that requires that we pick the most typical. I think we're trying to choose an excellent plan.
N.T. 1/27/22 at 450:10-10-16 (testimony of Dr. Duchin).

[19] The most poignant admission by Dr. Rodden of the phenomenon of Pennsylvania's human geography yielding a Republican tilt in maps was as follows:
Q. I really just want to get to the terminal statement of this --- this report. Proving such intent in court will be difficult in states where equally egregious electoral bias can emerge purely from human geography? Did I read that correctly?
A. Yes.
Q. And is that --- was that true when you said it?

districts, yet still compact and contiguous, those voters become grouped into divisions that, solely as a function of how people have self-sorted, tend to have a Republican lean. *See* SMR at 162-164, ¶¶ FF1-FF10; *see also* N.T. 1/27/22 at 181:9-20 (Dr. Rodden testifying).

And the foregoing most "typical outcome" is precisely reflected in Reschenthaler 1 and Reschenthaler 2. According to various experts in this case, these two maps produce a slight Republican tilt. *See supra*. This is utterly consistent with Pennsylvania's political geography.

In the end, for these reasons, and for the reasons stated above, the Court's choice in this matter is binary: pick either Reschenthaler 1 or Reschenthaler 2. All of the other proposed maps fail, in among other ways, the unequivocal constitutional requirement that they split counties and political subdivisions only when "absolutely necessary." All of the parties submitting these maps could have done better—as multiple experts acknowledged—but they elected not to, for reasons unknown. Their failing winnows the wheat from the chaff, leaving only two maps that have met the constitutional requirements to be selected as Pennsylvania's congressional plan. Accordingly, the Congressional Intervenors respectfully submit the Special Master erred in not recommending one of the Reschenthaler maps.

A. Yes.
Q. And is it still true today about Pennsylvania?
A. Yes.
N.T. 1/27/22 at 181:6-20.

V. CONCLUSION

For the foregoing reasons, Reschenthaler 1 and Reschenthaler 2 are the only maps that meet *all of* the constitutional requirements for a congressional district map. They should therefore be adopted by this Court.

Dated: February 14, 2022

Respectfully submitted,

/s/ Matthew H. Haverstick
Matthew H. Haverstick (No. 85072)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
Samantha G. Zimmer (No. 325650)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com
szimmer@kleinbard.com

Attorneys for Congressional Intervenors

IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 MM 2022

[Filed February 14, 2022]

CAROL ANN CARTER, et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, et al.,

Respondents.

***

PHILIP T. GRESSMAN, et al.

Petitioners,

v.

LEIGH M. CHAPMAN, et al.,

Respondents.

EXCEPTIONS TO SPECIAL MASTER'S REPORT BY GUY RESCHENTHALER, JEFFREY VARNER, RYAN COSTELLO, TOM MARINO, AND BUD SHUSTER

Per paragraph 5 of the Court's Order of February 2, 2022, Guy Reschenthaler, Jeffrey Varner, Ryan Costello, Tom Marino, and Bud Shuster (collectively, "the Congressional Intervenors") respectfully submit the following exceptions to the Report Containing Proposed Findings of Fact and Conclusion of Law Supporting Recommendation of Congressional Redistricting Plan and Proposed Revision to the 2022 Election Calendar/Schedule (hereafter, "the Report") issued on February 7, 2022:

1. The Congressional Intervenors take exception to, and this Court should decline to adopt, the Report's recommendation to adopt HB 2146 as the congressional plan for Pennsylvania; instead, the Court should adopt Reschenthaler 1 or 2 as the congressional plan for Pennsylvania.

2. The Congressional Intervenors take exception to, and this Court should decline to adopt, the following components of the Report's recommendations:

a. The Report's proposed finding that the Carter plan splits only 13 Counties;

b. The Report's proposed finding that only one plan violates the equal population requirement;

c. The Report's proposed finding that all of the proposed plans comply with the Voting Rights Act and the Fourteenth Amendment on the present record;

d. The Report's misinterpretation of the prohibition against splitting political subdivisions unless "absolutely necessary"; and

e. The other flaws discussed in the accompanying brief, which addresses these exceptions (and related errors) more fully.

WHEREFORE, the Congressional Intervenors respectfully request that the Court select Reschenthaler 1 or Reschenthaler 2 as the congressional redistricting plan for Pennsylvania.

Dated: February 14, 2022

Respectfully submitted,

/s/ Matthew H. Haverstick
Matthew H. Haverstick (No. 85072)
Joshua J. Voss (No. 306853)
Shohin H. Vance (No. 323551)
Samantha G. Zimmer (No. 325650)
KLEINBARD LLC
Three Logan Square
1717 Arch Street, 5th Floor
Philadelphia, PA 19103
Ph: (215) 568-2000
Fax: (215) 568-0140
Eml: mhaverstick@kleinbard.com
jvoss@kleinbard.com
svance@kleinbard.com
szimmer@kleinbard.com

Attorneys for Congressional Intervenors