

**IN THE SUPREME COURT OF PENNSYLVANIA**

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No. 7 MM 2022

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

Petitioners,

vs.

Leigh M. Chapman, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

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**SENATE REPUBLICAN INTERVENORS' BRIEF IN SUPPORT OF  
REPORT AND RECOMMENDATION OF SPECIAL MASTER**

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## Table of Contents

SCOPE AND STANDARD OF REVIEW .....	3
ARGUMENT .....	4
A.    H.B. 2146 Is a Product of the Legislative Process.....	4
B.    H.B. 2146 Satisfies All of the Traditional Redistricting Criteria .....	7
C.    H.B. 2146 Preserves Communities of Interest and there is Nothing to Suggest that, from a Partisan Perspective, it is Unfair.....	8
1.    H.B. 2146 Preserves Communities of Interest.....	8
2.    There is Nothing to Suggest that, from a Partisan Perspective, H.B. 2146 Is Not Fair .....	11
CONCLUSION.....	14

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Annenberg v. Com.*,  
757 A.2d 338 (Pa. 2000).....3

*Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*,  
576 U.S. 787 (2015).....1, 4

*Holt v. 2011 Legislative Reapportionment Comm’n*,  
67 A.3d 1211 (Pa. 2013).....8

*League of Women Voters of PA v. Commonwealth*,  
178 A.3d 737 (Pa. 2018).....4, 7, 8, 11

*Perry v. Perez*, 132 S. Ct. 934 (2012).....2

*Upham v. Seamon*, 456 U.S. 37 (1982) .....2

**Statutes**

42 Pa.C.S. § 726.....3

**Other Authorities**

PA. CONST. art I, § 5.....7

PA. CONST. art. II, § 1.....1, 4

PA. CONST. art. II, § 16 .....7

U.S. CONST. art I, § 4 .....4

During the two-day trial that the Honorable Patricia A. McCullough conducted in this matter, one fact became crystal clear: most of the congressional redistricting plans that were submitted to the Commonwealth Court satisfy all of the traditional, constitutionally-derived criteria for redistricting. But only one of the plans that meets those criteria, House Bill 2146 (“H.B. 2146” or the “Bill”), was the product of a public, transparent, and legislative process. The importance of this factor cannot be overstated or ignored. The United States and Pennsylvania Constitutions have assigned the task of redistricting the Commonwealth’s congressional districts to the Pennsylvania General Assembly. *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015); Pa. Const. art. II, § 1. The task, in other words, is expressly and constitutionally committed to the people’s elected representatives. It is a fundamentally legislative task.

H.B. 2146 embodies a 17-district congressional redistricting plan that both the Pennsylvania Senate and House of Representatives thoughtfully considered and passed. H.B. 2146 reflects a transparent, deliberative, and open legislative process, which involved negotiations, compromise, and policy judgments, and which the people’s elected representatives undertook in order to memorialize and implement state policy that reflects the will of their constituents.

During the trial, not a single expert witness testified that H.B. 2146 fails to satisfy the traditional redistricting criteria. Not a single expert witness offered

testimony to suggest that H.B. 2146 is otherwise unlawful, fractures communities of interest, or is insufficiently fair in light of partisan, racial, or other considerations. A witness, in fact, could not credibly offer testimony along those lines. H.B. 2146 meets all of the applicable redistricting requirements (compact and contiguous territory, population equality, and respect for the boundaries of political subdivisions), creates more highly competitive districts than any other map, preserves communities of interest, and, despite having been passed by the Republican-controlled General Assembly, favors Democratic candidates.

Against this backdrop, Judge McCullough was correct to conclude that “with all things being relatively equal with regard to the maps that the Court has not previously discounted or recommended not to be adopted, the Court respectfully recommends that our highest and most honorable institution in the judicial branch of government, our Supreme Court, recognize and revere the expressed will of the People, and the ‘policies and preferences of our State,’ as previously stated, and adopt HB 2146 to represent the boundary lines for the Commonwealth of Pennsylvania in its creation of geographically-unique congressional districts so that the citizens of our great Commonwealth are ensured fair and equal representation in the United States House of Representatives.” Report & Recommendation (“RR”) at 214-15 at ¶ 95 (quoting *Upham v. Seamon*, 456 U.S. 37, 41 (1982) and citing *Perry v. Perez*, 132 S. Ct. 934, 941 (2012)).

Senate Republican Intervenors Jake Corman, President *pro tempore* of the Pennsylvania Senate, and Kim Ward, Majority Leader of the Pennsylvania Senate, support Judge McCullough’s report and recommendation and respectfully request that this Court adopt H.B. 2146. In addition to the points that are discussed below, the Senate Republican Intervenors expressly reserve the right to present arguments at the oral argument in response to any exceptions that the parties and *amici* file to Judge McCullough’s report and recommendation.

### **SCOPE AND STANDARD OF REVIEW**

Under 42 Pa.C.S. § 726, this Court has exercised extraordinary jurisdiction over this matter and, in doing so, designated Judge McCullough as the Special Master. Under these circumstances, the Court’s scope of review is plenary and its standard of review is *de novo*. But where, as here, the Court designates a special master, the special master’s findings of fact, while not binding, are afforded “due consideration, as the jurist who presided over the hearings was in the best position to determine the facts.” *Annenberg v. Com.*, 757 A.2d 338, 343 (Pa. 2000). In this case, Judge McCullough presided over a two-day trial, heard extensive testimony from six expert witnesses, reviewed expert reports that those witnesses prepared, and likewise reviewed expert reports that several non-testifying experts prepared. Judge McCullough authored a comprehensive report and recommendation, setting forth more than 600 findings of fact and conclusions of law. Judge McCullough was in

the best position to make factual findings and credibility determinations and, accordingly, her report and recommendation is entitled to this Court’s careful consideration.

## **ARGUMENT**

### **A. H.B. 2146 Is a Product of the Legislative Process**

As the U.S. Supreme Court has stressed, under Article I, Section 4 of the United States Constitution, congressional “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” *Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 576 U.S. 787, 808 (2015). Pennsylvania’s legislative power (and therefore its power to engage in congressional redistricting) is vested exclusively in the General Assembly. *See* Pa. Const. art. II, § 1. In Pennsylvania, in other words, the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters of PA v. Commonwealth*, 178 A.3d 737, 821-22 (Pa. 2018).

Of the multitude of plans that were submitted to the Commonwealth Court, only H.B. 2146 reflects this constitutional directive and represents the deliberation, compromise, and public input that is a part of a transparent legislative process. No other party or *amici* submitted a redistricting plan that has made its way through *any* part of the legislative process, let alone a plan that both the Senate and House have

passed – or even a plan that has been subject to any sort of meaningful public input process at all.

On December 8, 2021, H.B. 2146 was introduced and referred to the House State Government Committee. RR at 47 (FF5). The Bill “embodied a 17-district congressional redistricting plan that a citizen and good-government advocate, Amanda Holt, had created on her own.” RR at 47 (FF6). The House State Government Committee made the bill available for public comment, leading to 399 comments, which resulted in amendments to the bill that were designed to increase the compactness of certain districts and ensure that certain communities of interest were preserved. RR at 48 (FF8 & FF9). On January 11, 2022, the Bill was brought up for second consideration and, on January 12, 2022, the House of Representatives passed it. RR at 48 (FF10).

In the Senate, H.B. 2146 was referred to the State Government Committee. On January 18, 2022, the Bill was reported out of that committee and brought up for first consideration. RR at 48 (FF11). On January 19, 2022, the Bill was brought up for second consideration. RR at 48 (FF12). On January 24, 2022, it was referred to the Senate Appropriations Committee, reported out of that committee, and brought up for third consideration. RR at 48 (FF13). On the same day, the Senate passed H.B. 2146 and the Bill was presented to the Governor, who then vetoed it on January 26, 2022. RR at 48 (FF13 & FF14).



No other party's or *amici*'s plan has been through a similar process. Indeed, both the House Democrats and the Senate Democrats, as members of the General Assembly, could have circulated co-sponsorship memos for proposed plans, introduced their own bills that embodied proposed plans, or offered amendments to H.B. 2146 during the legislative process. They did not do so, instead choosing to forego the legislative process altogether. Similarly, between August 2021 and January 2022, the Governor refused to engage with legislative leaders on the drawing of congressional maps, suggesting that, in this context, he has "no role" in the bill passage process. His claimed lack of any role in the process is belied by his own position in this case, as well as his mid-January release of the very map that he now submits to this Court for consideration, which was essentially presented as a take-it-or-leave it option for the General Assembly at the last legislative moment.

The importance of these dynamics should not be overlooked or diminished. Undertaking redistricting through legislative means and a transparent public process is a fundamental constitutional principle that, as Judge McCullough correctly concluded, elevates H.B. 2146 above the plans that the other parties and *amici* have presented. RR at 214 at ¶ 95. The Constitution envisions that the legislature, not a supercomputer or individual expert witness, will create the redistricting map that governs Pennsylvania's congressional elections for the next decade.

**B. H.B. 2146 Satisfies All of the Traditional Redistricting Criteria**

H.B. 2146 unquestionably satisfies all of the traditional, constitutionally-derived criteria for a redistricting plan: compact and contiguous territory, population equality, and respect for the boundaries of political subdivisions. *See League of Women Voters*, 178 A.3d at 816 (determining that, under Article I, Section 5 of the Pennsylvania Constitution, *i.e.*, the “Free and Equal Elections Clause,” the criteria in Article II, Section 16, which apply to the creation of state legislative districts, likewise apply to congressional redistricting).

The experts agreed, and Judge McCullough found, that all of the proposed plans satisfy the contiguity requirement. RR at 137 (CL1), 192 (¶ 16). All of the plans, moreover, perform well on the compactness metrics that the experts used. RR at 147 (FF1 & FF3), 193 (¶ 22). And, with the exception of the Carter Petitioners’ Plan and the House Democratic Plan, all of the plans also achieve population equality within a one-person deviation. RR at 138 (CL2), 192 (¶ 18).

With respect to maintaining the boundaries of political subdivisions, the Pennsylvania Constitution identifies six types of subdivisions to consider: counties, cities, incorporated towns, boroughs, townships, and wards. Pa. Const. art. II, § 16. H.B. 2146, in this regard, is among the plans that split the lowest total number of these subdivisions. RR at 147 (FF3), 193 (¶ 23).

It follows that, when it comes to the four fundamental constitutional requirements for a redistricting map, H.B. 2146 performs well, as do other plans. But what sets H.B. 2146 apart, as explained above, is its status as the only plan that has passed through the legislative process or, for that matter, *any* meaningful public input process at all.

As explained below, moreover, there is nothing to suggest that, in meeting the traditional redistricting criteria, H.B. 2146 is otherwise unlawful or fails to preserve communities of interest or, from a partisan perspective, is not sufficiently fair. To the contrary, H.B. 2146 performs *better* on these metrics than the other plans.

**C. H.B. 2146 Preserves Communities of Interest and there is Nothing to Suggest that, from a Partisan Perspective, it is Unfair**

**1. H.B. 2146 Preserves Communities of Interest**

As Judge McCullough noted, this Court in *League of Women Voters* emphasized the importance of “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[.]” RR at 152-53 (quoting *League of Women Voters*, 178 A.3d at 814). *See also Holt v. 2011 Legislative Reapportionment Comm’n*, 67 A.3d 1211, 1241 (Pa. 2013) (“*Holt II*”) (“redistricting efforts may properly seek to preserve communities of interest which may not dovetail precisely with the static lines of political subdivisions”).

On this point, the proposed plans can be distinguished from one another based on whether they split the City of Pittsburgh. RR at 151 at CL3 (concluding that “the maintenance of the City of Pittsburgh within one district is an important factor, which is entitled to weight in the ultimate analysis”); RR at 155 (FF5). This variable is important because, as Judge McCullough observed, “it is undisputed that Pittsburgh’s population is not so great that it is *necessary* to divide the city into multiple congressional districts, as is the case with Philadelphia.” RR at 149 (FF4) (emphasis in original). As Judge McCullough likewise observed, “[t]he Court further heard credible evidence which supports the conclusion that the City of Pittsburgh in many ways constitutes a community of interest, such that its division would not be in the best interests of its residents.” RR at 149 (FF9). Judge McCullough heard evidence, for example, that Pittsburgh voters tend to favor local candidates in statewide elections and share common interests in acquiring federal funds and obtaining constituent services. RR at 150 (FF10 & FF11).

Despite the fact that Pittsburgh “in many ways constitutes a community of interest,” the plans from the Governor, the Senate Democratic Caucus, Draw the Lines PA, and Khalif Ali all split Pittsburgh. RR at 151. The House Democratic Caucus’s Plan, for its part, preserves Pittsburgh but “draws a Freddy Krueger-like claw district in Allegheny County to ‘grab’ Pittsburgh to combine it with small Republican-leaning areas to the north.” RR at 152 (FF20). Judge McCullough

determined that these tactics suggest a partisan aim to turn one Democratic-leaning district into two such districts. RR at 151 (FF18), 194 (¶ 28). H.B. 2146, on the other hand, preserves Pittsburgh.

Judge McCullough reached similar conclusions in connection with the parties' and *amici*'s approach to Philadelphia, which, as noted above, must be split based on the size of its population. Judge McCullough found that Philadelphia's surplus population should not be joined with Bucks County in order to form a district. RR at 157-58 (FF16). She correctly determined, in this regard, that lower and upper Bucks County communities are similar to one another, but different from Philadelphia, when it comes to demography, economics, land use, and commercial and commuting interests, and that "[a]ttaching the lower Bucks communities to Philadelphia would render those communities 'orphans' from an interest and advocacy standpoint." RR at 158 (FF17) (quoting Dr. Naughton expert report). Crediting Dr. Naughton's un rebutted expert testimony, Judge McCullough, as a corollary, explained that "Philadelphia's surplus population would be best combined with a district with maximum commonality – that is, with common interests with Philadelphia, such as use of public transit, recipient of federal transfer payments and common commercial and industrial interests" and that communities in Delaware County fit this description. RR at 159 (FF18-FF21). H.B. 2146 accomplishes these preferred groupings unlike, for example, the Governor's proposed plan, which splits

Bucks County and connects Philadelphia’s surplus population to the southern part of Bucks County instead of Delaware County. RR at 160 (FF22-FF26).

**2. There is Nothing to Suggest that, from a Partisan Perspective, H.B. 2146 Is Not Fair**

In *League of Women Voters*, this Court acknowledged that, under the Commonwealth’s Constitution, factors like “protection of incumbents” and “the maintenance of the political balance which existed after the prior reapportionment” can play a role in the creation of a redistricting plan. 178 A.3d at 817. But the Court also concluded that, under the Free and Equal Elections Clause, those factors must be “wholly subordinate” to the “neutral [redistricting] criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among...districts.” *Id.* The Court then stated that, along similar lines, when a redistricting body crafts a redistricting plan, it may not “unfairly dilute the power of a particular group’s vote for a...representative.” *Id.* It did not attempt to define the contours of “unfair” vote-dilution.

Although, during the trial in this matter, the experts testified at length about various ways to measure the partisan fairness of a map, no single metric can determine whether a map is fair. *See* RR at 164-176 (discussing the various metrics). Further, no expert opined that H.B. 2146 is unfair.

In this context, as Judge McCullough explained, any discussion of partisan fairness must take into account Pennsylvania’s political geography. RR at 162 at FF2

(“Based upon the evidence credited, the Court finds that Pennsylvania’s unique ‘political geography’ affects the analysis of partisan advantage in any proposed map.”). In particular, a redistricting map for the Commonwealth that is drawn randomly and that complies with the traditional redistricting criteria, but that is not drawn with reference to any partisan data, will tend to yield more seats for Republicans than Democrats in comparison to vote share. RR at 162. As Judge McCullough noted, even Governor Wolf’s own expert, Dr. Moon Duchin, acknowledged this point. RR at 84-85 (FF166). The pro-Republican “tilt” is a function of the fact that Democratic voters tend to be concentrated in urban regions of Pennsylvania, while Republican voters tend to be distributed throughout the other parts of the Commonwealth. RR at 162 (FF1-FF3). And if a mapmaker, in drawing a congressional redistricting map, attempts to “adjust” or “control” for this phenomenon, that person is necessarily drawing the map with an intent to achieve a particular partisan outcome. RR 162-63 (FF4-FF6).

One way to evaluate partisan fairness, while properly taking account of political geography, involves comparing a proposed map to a set of randomly-generated simulated maps that follows only the traditional redistricting criteria. RR at 164 (FF1). As Judge McCullough correctly observed, in light of the Commonwealth’s political geography, “if a plan is not evaluated against a non-partisan set of maps, the potential issues or red flags in the maps may not at all be

due to partisan gerrymandering, but rather the geographic distribution of voters in the state.” RR at 164 (FF3) (citing Dr. Barber expert report at 11). The House Republican Intervenors’ expert, Dr. Michael Barber, therefore compared H.B. 2146 to a set of 50,000 simulated 17-district maps, all of which adhere to the traditional redistricting criteria and none of which were created with reference to any partisan data. RR 164-165 (FF4-FF6). And, as Judge McCullough confirmed, “[t]he simulation analysis performed by Dr. Barber demonstrates that HB 2146 is predicted to result in nine Democratic-leaning seats and eight Republican-leaning seats using an index of statewide elections from 2012-2020, whereas the most likely outcome in his 50,000 simulated maps, created without using partisan data, is eight Democratic-leaning seats and nine Republican-leaning seats.” RR at 165 (FF7).

What is more, H.B. 2146 creates five competitive seats, which is more competitive districts than any other plan, and four of those seats lean Democratic. RR at 212 (¶ 81). It also scores as a fair and unbiased plan under all of the other metrics that the experts used to assess partisan bias. RR at 212 (¶¶ 82-83).

All of these factors underscore that, as Judge McCullough correctly determined, H.B. 2146 is a fair map, and nothing in the record suggests otherwise.



## CONCLUSION

The legislative process is one that, under both the United States and Pennsylvania Constitutions, is the principal and preferred method for drawing congressional districts. As a legislatively-approved plan that meets all of the applicable redistricting criteria, the H.B. 2146 map is not only a reasonable choice, but should be the preferred choice in order to honor the General Assembly's constitutional prerogative to engage in redistricting and express the will of the voters.

For these reasons, the Senate Republican Intervenors respectfully request that the Court adopt the H.B. 2146 map.

Dated: February 14, 2022

Respectfully submitted,

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## CERTIFICATION OF COMPLIANCE

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

/s/ Anthony R. Holtzman  
Anthony R. Holtzman

## CERTIFICATE OF SERVICE

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

**Service by PACFile eService as follows:**

All counsel of record

Date: February 14, 2022

/s/ Anthony R. Holtzman  
Anthony R. Holtzman