

IN THE SUPREME COURT OF PENNSYLVANIA

CAROL ANN CARTER, *et al.*,
Petitioners,

v.

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

:
:
: **CASES**
: **CONSOLIDATED**

: No. 7 MM 2022

PHILIP T. GRESSMAN, *et al.*,
Petitioners,

v.

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

**GRESSMAN MATH/SCIENCE PETITIONERS’
EXCEPTIONS TO SPECIAL MASTER’S REPORT**

On Application for Extraordinary Relief from
Commonwealth Court Docket Nos. 464 MD 2021 and 465 MD 2021

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Petitioners Philip T. Gressman, Ron Y. Donagi, Kristopher R. Tapp, Pamela Gorkin, David P. Marsh, James L. Rosenberger, Amy Myers, Eugene Boman, Gary Gordon, Liz McMahon, Timothy G. Feeman, and Garth Isaak (collectively, the “Gressman Math/Science Petitioners” or the “GMS Petitioners”) submit the following exceptions to the February 7, 2022 Report of Commonwealth Court Judge Patricia A. McCullough, acting as a Special Master pursuant to this Court’s February 2, 2022 Order.

The GMS Petitioners summarize here the central reasons they take exception to the Special Master’s Report. More detail, with supporting argument and citations to the record below, can be found in the GMS Petitioners’ brief, filed concurrently with these Exceptions.

The Special Master’s Report contains numbered proposed findings and conclusions, but the numbering resets to 1 from section to section, and in some instances, the Report provides numbered paragraphs that are not clearly identified as findings of fact or conclusions of law. Accordingly, to aid in the Court’s review, the GMS Petitioners provide both the number corresponding to particular proposed findings, conclusions, or paragraphs, as well as the corresponding page number.

EXCEPTIONS

1. The Special Master recommended adoption of a plan that is clearly inferior to the GMS (Gressman Math/Science) Plan on all relevant metrics. [FF107

(Pages 73–74); FF109 (Page 74); FF15–16 (Page 144); FF37–40 (Pages 146–47); FF25 (Page 172); ¶ 12 (Page 191); ¶ 23 (Page 193); Page 205 (erroneous proposed recommendation regarding the Gressman Plan); ¶ 64–65 (Pages 208–09); ¶¶ 67–68 (Pages 209–10); ¶¶ 76–83 (Pages 211–212); ¶¶ 85–88 (Pages 212–13).]

2. The Special Master erroneously accorded deference to House Bill 2146 (HB2146) even though that bill was vetoed by the Governor and never become law. [¶¶ 61–65 (Pages 208–09); ¶¶ 89–97 (Pages 213–17).]

3. The Special Master miscalculated political-subdivision splits in numerous and repeated instances, which led to a flawed analysis of the extent to which each proposed plan split the six types of subdivisions enumerated in the Pennsylvania Constitution more times than was “absolutely necessary.” PA. CONST. art. II, § 16. [CL3 (Page 142); FF3–4 (Pages 142–43); FF7–10 (Page 143); FF12 (Page 143); FF15–16 (Page 144); FF18–23 (Pages 144–45); FF25–28 (Page 145); FF30–31 (Pages 145–46); FF33 (Page 146); FF36–43 (Pages 146–47); ¶¶ 23–24 (Page 193); ¶ 67 (Pages 209–10).]

4. The Special Master erroneously assessed the expert evidence on the neutral redistricting criteria and repeatedly made erroneous “apples to oranges” comparisons of various metrics, leading to incorrect conclusions of law. [FF81 (Page 70); FF137–139 (Pages 79–80); CL2 (Page 138); FF1–4 (Pages 142–43); CL3 (Page 142); FF42–43 (Page 147); FF2–3 (Page 147); FF9 (Pages 155–56); ¶ 17

(Page 192); ¶¶ 23–25 (Pages 193–94); ¶¶ 51–54 (Pages 206–07); ¶ 67 (Pages 209–10).]

5. The Special Master erroneously assessed the expert evidence on the efficiency-gap, mean-median, and anti-majoritarian-outcomes measures of partisan fairness, such as by misconstruing what the experts actually reported, relying on experts with unsupported methodologies, or providing an incomplete statement of the expert opinions on these metrics. [FF92 (Page 71); FF97 (Page 72); FF107–10 (Pages 73–74); FF234 (Page 97), FF258 (Page 101); FF4 (Page 167); FF11–23 (Pages 168–71); FF25 (Page 172); FF1 (Page 172); FF18–19 (Pages 175–76); ¶ 12 (Page 191); ¶¶ 40–43 (Page 197); Page 205 (erroneous recommendation regarding the Gressman Plan); ¶¶ 57–60 (Pages 207–08); ¶¶ 65–66 (Page 209); ¶¶ 78–83 (Pages 211–12); ¶ 88 (Page 213).]

6. The Special Master erroneously credited and gave weight to the testimony of Dr. Keith Naughton, who offered only his personal opinions based on no methodology, data, or research, and who lacks any expertise in redistricting. [FF214 (Page 93); FF221–27 (Pages 94–95); FF230–36 (Pages 96–97); FF10 (Page 150); FF2–5 (Pages 154–55); FF15–28 (Pages 157–61); ¶ 31 (Page 195); ¶¶ 69–75 (Pages 210–11).] Moreover, the Special Master improperly gave weight to Dr. Naughton’s opinion because, in her view, the parties had not rebutted Dr. Naughton’s testimony [FF10 (Page 150); FF17 (Page 151); FF2–5 (Pages 154–55);

¶¶ 69–73 (Pages 210–11)], but his sole expert report was not filed until the final deadline for all expert *rebuttal* reports, less than 16 hours before the evidentiary hearing commenced; the Special Master refused to allow rebuttal witnesses; and the Special Master unilaterally decided the order of witnesses, with Dr. Naughton testifying next-to-last.

7. The Special Master erroneously credited and gave weight to the testimony of Dr. Michael Barber, who lacks expertise in redistricting and whose partisan-fairness testimony was methodologically flawed and unsupported. [FF175–83 (Pages 86–88); FF188–213 (Pages 88–93); FF8 (Page 149); CL2 (Page 149); FF1–13 (Pages 164–66); FF11–23 (Pages 168–71); FF1–16 (Pages 172–75); FF20–23 (Page 176); ¶¶ 41–43 (Page 197); ¶¶ 57–60 (Pages 207–08); ¶ 66 (Page 209); ¶¶ 78–83 (Pages 211–12).]

8. The Special Master misinterpreted the evidence and erroneously concluded, as both a legal and a factual matter, that any fair map must be biased in favor of Republicans as a result of Pennsylvania’s political geography. [FF110 (Page 74); FF1–10 (Pages 162–64); Pages 176–78 (discussion); ¶ 12 (Page 191); ¶¶ 37–42 (Pages 196–97); ¶ 44 (Page 198); ¶¶ 57–60 (Pages 207–08); ¶ 65 (Page 209); ¶¶ 78–83 (Pages 211–12).]

9. The Special Master erroneously identified as the maps best complying with the Free and Equal Elections Clause the four maps that are, in reality, the most

unfair and have the largest pro-Republican bias. [FF109 (Page 74); FF258 (Page 101); ¶ 12 (Page 191); Page 205 (erroneous recommendation regarding the Gressman Plan); ¶¶ 57–60 (Pages 207–08); ¶ 65 (Page 209); ¶¶ 78–83 (Pages 211–12); ¶ 88 (Page 213).]

10. The Special Master misread and misapplied both the holding relating to, and the relevance of, the expert evidence in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (“*LWV I*”). [FF92 (Page 71); Page 166 (discussion); FF1 (Page 166); FF24 (Page 171); FF1 (Page 172); FF18–19 (Pages 175–76); FF12 (Page 191); ¶¶ 57–59 (Pages 207–08); ¶ 65 (Page 209); ¶ 88 (Page 213).]

11. The Special Master misapplied *LWV I*, 178 A.3d at 817, in failing to adequately and correctly evaluate plans for partisan fairness, in part by ignoring the Supreme Court’s caution that “advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral ‘floor’ criteria nevertheless operate to unfairly dilute the power of a particular group’s vote for a congressional representative.” [FF104 (Page 73); FF74 (Page 103); FF9 (Pages 155–56); Pages 176–78 (discussion); ¶ 12 (Page 191); ¶¶ 43–44 (Pages 197–98); ¶ 88 (Page 213).]

12. The Special Master erroneously elevated preservation of communities of interest above the constitutional redistricting criteria and failed to account for the extent to which preservation of political subdivisions preserves communities of interest. [FF103 (Page 73); FF111 (Page 74); Pages 152–54 (discussion of law on communities of interest); FF1–28 (Pages 154–61); FF10 (Page 156); Page 205 (erroneous recommendation regarding the Gressman Plan).]

13. The Special Master erroneously cited or relied on expert evidence that (a) was hearsay because the experts did not testify under oath and (b) should not receive any weight because it was never subjected to cross-examination. [FF260–339 (Pages 101–14); Pages 114–17 (recommended findings on evidentiary objections).]

14. The Special Master erroneously rejected the GMS Plan based on an incorrect finding, not supported by any evidence, that the GMS Plan was designed to optimize on partisan fairness. [FF2 (Page 178); ¶ 47 (Page 198); Page 205 (erroneous recommendation regarding the Gressman Plan).]

15. The Special Master erroneously found that the GMS Plan did not adequately account for preservation of communities of interest. [FF103 (Page 73); FF111 (Page 74); FF8 (Page 155); FF10 (Page 156); ¶ 47 (Page 198); Page 205 (erroneous recommendation regarding the Gressman Plan).]

16. The Special Master erroneously found, contrary to record evidence, that the GMS Plan had a partisan bias in favor of Democratic voters. [¶¶ 41–42 (Page 197); ¶ 47 (Page 198); Page 205 (recommendation regarding the Gressman Plan).]

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief filed concurrently with these Exceptions, the GMS Petitioners take exception to the Special Master’s Report and respectfully suggest that, rather than adopting the Special Master’s recommendation, the Court should adopt the GMS Plan for the people of the Commonwealth.

Dated: February 14, 2022

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I 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.

Submitted by: Kim M. Watterson

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PROOF OF SERVICE

On February 14, 2022, I caused a copy of the foregoing to be served on all counsel of record via the electronic filing system, PACFile:

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