

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

**GABRIEL INGRAM, RUTH
MOTON, MARK KIRCHGASSER
and SUE POWELL,**

Petitioners,

v.

**2021 LEGISLATIVE
REAPPORTIONMENT
COMMISSION,**

Respondent.

No.: _____

**BRIEF IN SUPPORT OF PETITION
FOR REVIEW CHALLENGING THE
LEGISLATIVE REAPPORTIONMENT
COMMISSION FINAL REPORT**

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I. Standard of Review.

The Court's standard of review is defined by the Pennsylvania Constitution: the plan may be held unconstitutional only if Petitioners establish that it is "contrary to law." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 733 (2012); *citing* Pa. Const. art. II, § 17(d).

The Court's review is *de novo*, and the Legislative Reapportionment Commission's final plan "enjoys the same status as any action or decision where the challenging party bears the burden; and here, the burden is upon appellants to show that the plan is contrary to law." *Holt v. 2011 Legislative Reapportionment Commission*, 67 A.3d 1211 (2013), *citing Holt I*, 38 A.3d at 735.

"As we made clear in *Holt I*, the Constitution simply 'does not dictate any form of deference to the LRC, does not establish any special presumption that the LRC's work product is constitutional, and it also places no qualifiers on this Court's scope of review.'" *Id.* at 408, *citing Holt I*, 38 A.3d at 730, 733-34.

II. Summary of Argument.

By utilizing expected election outcomes as a significant criterion in the reapportionment process, the Commission has issued a Final Plan contrary to law. Further, by utilizing altered U.S. Census data to facilitate a

legally flawed decision that includes state prisoners in the population counts of their respective district of pre-incarceration versus their districts of incarceration, the Commission has issued a Final Plan contrary to law. Finally, the Final Plan fails to comply with Article II, Section 16 of the Pennsylvania Constitution which requires districts to be composed of compact and contiguous territory as nearly equal in population as practicable and unless absolutely necessary, no county, city, incorporated town, borough, township or ward shall be divided.

III. Argument.

The Pennsylvania Constitution sets forth the requirements for the establishment of legislative districts in the Commonwealth of Pennsylvania.

Article I, Section 5 – Elections, provides in relevant part as follows:

Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of right of suffrage.

Pa. Const. art. I, §5.

Article I, Section 29 of the Pennsylvania Constitution – Prohibition against denial or abridgment of equality of rights because of race or ethnicity

provides in relevant part as follows:

Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the race or ethnicity of the individual.

Pa. Const. art. I, §29.

Article II, Section 17 – Legislative Reapportionment Commission, establishes the Pennsylvania Legislative Reapportionment Commission and vests with it the power to create a final plan for the creation of legislative districts in the Commonwealth of Pennsylvania. See Pa. Const. art. II, §17.

Lastly, Article II, Section 16 of the Pennsylvania Constitution – Legislative Districts, provides in relevant part 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.

A. The Commission failed to adhere to the requirements set forth in Article II, Section 16 of the Pennsylvania Constitution.

On March 4, 2022, Mark A. Nordenberg, Chair of the 2021 Pennsylvania Legislative Reapportionment Commission, issued a Report Regarding the Commission’s Final Plan in which Chairman Nordenberg on behalf of the Commission opined as follows:

[m]ost basically, a fair map should be responsive to voters’ preferences. Otherwise, why would people vote? So when voter preferences change dramatically, so too should the composition

of the General Assembly. To put it in simple terms, when there is a blue-wave election, the makeup of the General Assembly should reflect that blue wave, and when there is a red-wave election, the makeup of the General Assembly should reflect that red wave. ... It also is reasonable to expect that the party that wins the most votes generally also should win the most seats. Similarly, when the two parties each receive 50% of the votes, they should each received about 50% of the seats. Both of these expectations are consistent with basic fairness and democratic principles, according to Professor Warshaw. ...

See Appendix B to Petitioners' Petition for Review, at pg. 53-4.

Chairman Nordenberg's opinion is one of several significant examples of the Commission's legally improper deviation from and subordination of the reapportionment criteria set forth in Article II, Section 16 of the Pennsylvania Constitution as well as the other applicable constitutional provisions.

"Red-waves" and "blue-waves" may be relevant talking points for the media's countless political pundits; but the ebb and flow, or successes and failures, of our nation's political parties is outside the scope of the important work of the Commission. In Chairman's Nordenberg's opinion, when the Republicans and Democrats each "receive 50% of the votes, they [Republicans and Democrats] should each received about 50% of the seats." *Id.* Giving such weight to a purely political thesis ignores the significance of independents and members of other political parties, voters who routinely cross traditional party lines, and the countless other factors affecting political

elections, not least of which is the fact that we vote for candidates, not political parties.

“The constitutional reapportionment scheme does not impose a requirement of balancing 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).

By utilizing expected election outcomes as a significant criterion in the reapportionment process, the Commission has issued a Final Plan contrary to law.

B. The Commission utilized altered U.S. Census Bureau data to include state prisoners in their pre-incarceration districts of residence.

Chairman Nordenberg further opined that “... in amending the Constitution to create the Commission, the voters removed the power of the General Assembly over legislative redistricting and placed that power exclusively in the Commission” and as such, “the Commission had the legal authority to choose to count prisoners based on their place of residence prior to incarceration, ... a policy choice for the Commission to make.” See Appendix B to Petitioners’ Petition for Review, at pg. 22-3.

The Commission failed to cite a single case as legal precedent in support of the Commission’s decision to implement its policy choice, or for

that matter the authority to make any such policy choices. The Commission is correct in its assertion that its power is derived from the Pennsylvania Constitution. Likewise, the Commission's authority is limited to the power granted it by the Pennsylvania Constitution. There is a large number of cases cited by the Commission in support of its legal authority under the Pennsylvania Constitution. There is no such case authorizing the Commission to alter U.S. Census data in the furtherance of its policy choice to count state prisoners based on their pre-incarceration district as opposed to their district of incarceration. The lack of clearly identified legal authority to alter U.S. Census data in the furtherance of a policy choice is a fatal legal flaw in the Final Plan.

In addition, the Commission's Final Plan allocates incarcerated state prisoners differently than how this Court allocated incarcerated state prisoners in its most recent Congressional Reapportionment Plan. See *Carter, et al. v. Chapman, et al.*, 7 MM 2022. As this Court knows, in *Carter* the Court relied upon the U.S. Census data which counts incarcerated state prisoners in the population totals of the districts of incarceration, not the districts of pre-incarceration.

By utilizing altered U.S. Census data to facilitate a legally flawed decision to include state prisoners in the population counts of their district of

pre-incarceration versus their districts of incarceration, the Commission has issued a Final Plan contrary to law.

C. The Final Plan unnecessarily divides counties, cities, towns, boroughs, townships, other municipalities, and/or other political subdivisions, in violation of Article II, Section 16 of the Pennsylvania Constitution.

As set forth by this Court in *Holt v. 2011 Legislative Reapportionment Com'n*, 38 A.3d 711 (Pa. 2012),

[t]he substantive task of the [Legislative Reapportionment Commission] in decennial redistricting is governed by Article II, Section 16 of the Pennsylvania Constitution which provides:

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.

Holt, 38 A.3d at 717; *citing* Pa. Const. art. II, § 16.

The 2021 Legislative Reapportionment Commission Final Plan fails to satisfy these fundamental constitutional requirements in that the Commission's Final Plan unnecessarily divides counties, cities, towns, boroughs, townships, other municipalities and political subdivisions, and

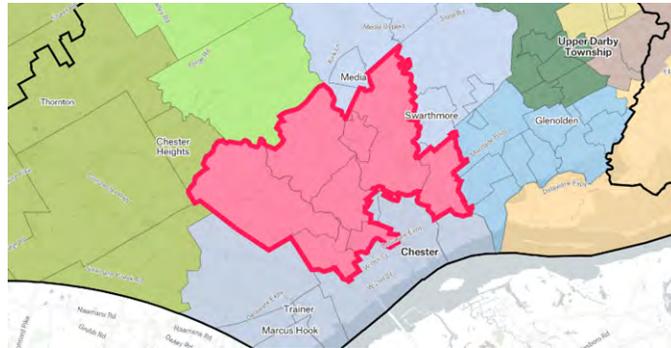
further fails to establish legislative districts which are “as nearly equal in population as practicable.” Pa. Const. art. II, § 16.

As an example, the Final Plan divides Chester City from Chester Township, significantly altering the racial composition of the 159th district. Historically, the 159th district contained both the City of Chester together with Chester Township, thereby maintaining the communities of interest therein. However, the Final Plan has been converted from a Majority Minority district to a Plurality Minority district.

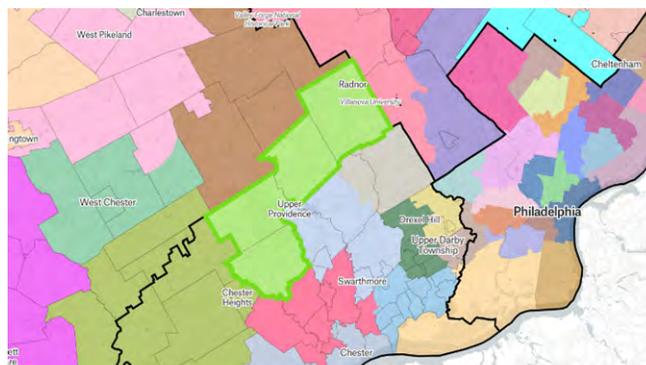
By way of further example, the Final Plan unnecessarily divides Middletown Township, Delaware County, including districts and precincts within Middletown Township, into two House of Representatives districts. Middletown Township District No. 1, which includes Precincts 1, 2, and 3, and Middletown Township District No. 2, which includes Precincts 1 and 2, have been split from the 168th House of Representatives district and moved into the 161st House of Representatives district. While the Middletown Township District No. 1, Precinct No. 1, remains in the 168th House of Representatives district. Appendix A.

The 161st House of Representatives district consists of “Part of DELAWARE County consisting of the TOWNSHIPS of Aston, Chester, Middletown (PART, Districts 01 and 02 [PART, Divisions 01 and 02]), Nether

Providence and Ridley (PART, Wards 01 [PART, Divisions 01 and 03], 02, 05 [PART, Division 01] and 07) and the BOROUGHS of Brookhaven, Rose Valley and Upland” with a total population of 63,804. Appendix A. See also *red highlighted area below.*



The 168th House of Representatives district consists of “Part of DELAWARE County consisting of the TOWNSHIPS of Edgmont, Middletown (PART, Districts 02 [PART, Division 03], 03 and 04), Newtown and Radnor” with a total population of 62,978. Appendix A. See also *light green highlighted area below.*



Middletown Township, Delaware County, is one example of the numerous occasions where the 2021 Legislative Reapportionment

Commission unnecessarily divided counties, cities, towns, boroughs, townships, other municipalities and/or other political subdivisions throughout the Commonwealth of Pennsylvania in violation of the Pennsylvania Constitution.

In addition, the Final Plan splits numerous communities of interest, such as school district, into multiple legislative districts. The Final Plan unnecessarily divides the Rose Tree School District into three House of Representative districts: the 161st, 165th, and 168th. The Commission was presented with several reapportionment options in compliance with the constitutional requirements that did not divide the Rose Tree School District into multiple districts. In the prior House of Representatives map, the entire Rose Tree School District was in the 168th House District.

The Marple Newtown School District was also split into three legislative districts by the Commission's 2021 Final Plan. The Marple Newton School District is comprised of the communities of Newtown Township and Marple Township and has served to unite these two communities through the existence of a single educational unit. However, the Marple Newtown School District will now be split into the 165th, 166th, and 168th legislative districts.

The Final Plan unnecessarily divides the Wallingford-Swarthmore School District into two House of Representative districts: the 161st and 165th.

The Commission was presented with several reapportionment options in compliance with the constitutional requirements that did not divide the Wallingford-Swarthmore School District into two districts. In the prior House of Representatives map, the entire Wallingford-Swarthmore School District was in the 161st House District.

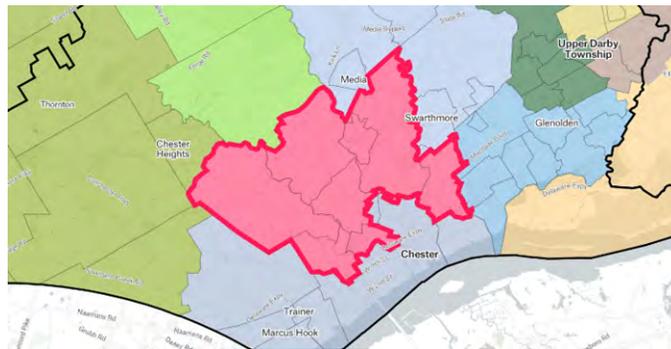
The 2021 Final Plan unnecessarily divides the Unionville-Chadds Ford School District into two House of Representative districts: the 160th and 158th. The Commission was presented with several reapportionment options in compliance with the constitutional requirements that did not divide the Unionville-Chadds Ford School District into two districts. In the prior House of Representatives map, the entire Unionville-Chadds Ford School District was in the 160th House District.

Historically, the municipalities comprising these School Districts have established shared community of interest, within their respective school districts, through their common commitment to the educational values, priorities, concerns, and issues common to their respective school districts and communities. These communities of interest were protected and preserved by the inclusion of the school districts within the same district under the prior Legislative District Map.

D. The Final Plan fails to maintain population deviations that are as nearly equal in population, as practicable.

The following are examples relevant to the Petitioners. There are even greater population deviations throughout the Commonwealth under the Final Plan.

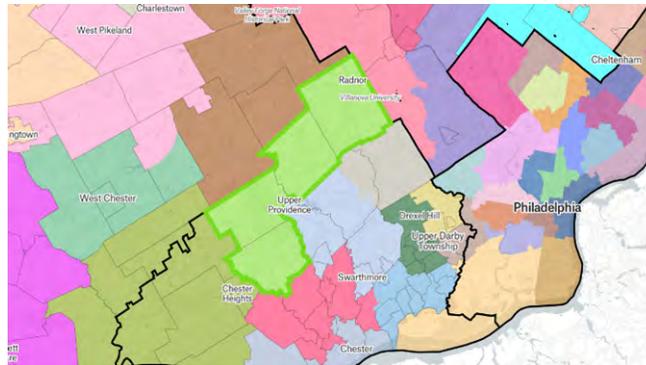
The 161st House of Representatives district consists of “Part of DELAWARE County consisting of the TOWNSHIPS of Aston, Chester, Middletown (PART, Districts 01 and 02 [PART, Divisions 01 and 02]), Nether Providence and Ridley (PART, Wards 01 [PART, Divisions 01 and 03], 02, 05 [PART, Division 01] and 07) and the BOROUGHS of Brookhaven, Rose Valley and Upland” with a total population of 63,804. See Appendix “A.” See *also red highlighted area below.*



Under the Final Plan, the 168th House of Representatives district consists of “Part of DELAWARE County consisting of the TOWNSHIPS of Edgmont, Middletown (PART, Districts 02 [PART, Division 03], 03 and 04),

Newtown and Radnor” with a total population of 62,978. See Appendix “A.”

See also light green highlighted area below.

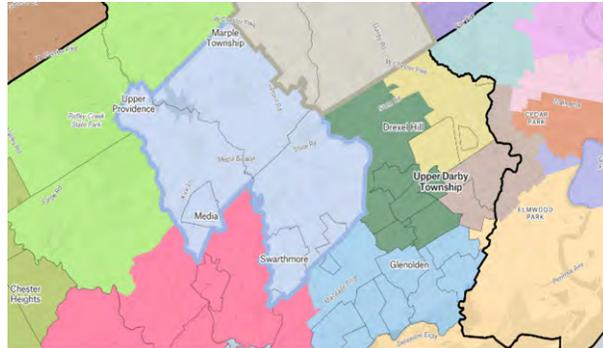


By way of further example of the Final Plan’s violation of the Pennsylvania Constitution, the total population of the 161st House of Representatives district has a deviation of -249 or -0.39% from the average population of 64,053, per district. The total population of the 168th House of Representatives district has a deviation of -1,075 or -1.68% from the average population of 64,053, per district. Additional examples of population deviations are illustrated below. See Appendix “A”

In addition to the 161st and 168th House of Representatives districts described above, under the Final Plan, the 165th House of Representatives district consists of “Part of DELAWARE County consisting of the TOWNSHIPS of Marple (PART, Wards 04 [PART, Division 02], 05, 06 and 07), Springfield and Upper Providence and the BOROUGHS of Media,

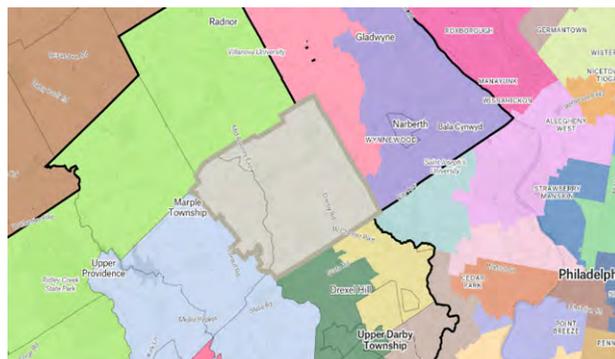
Moton and Swarthmore” with a total population of 62,800. See Appendix “A.”

See also light blue highlighted area below.



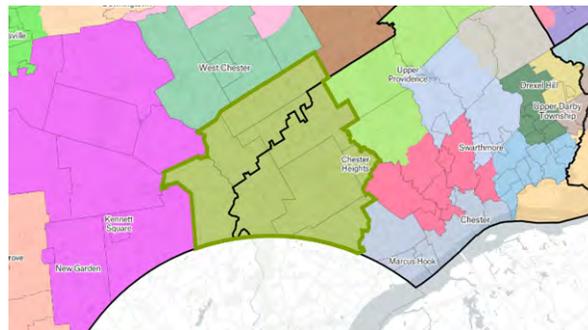
The total population of the 165th House of Representatives district has a deviation of -1,253 or -1.96% from the average population of 64,053, per district.

In addition to the 161st, 165th, and 168th House of Representatives districts described above, under the Final Plan, the 166th House of Representatives district consists of “Part of DELAWARE County consisting of the TOWNSHIPS of Haverford and Marple (PART, Wards 01, 02, 03 and 04 [PART, Divisions 01 and 03])” with a total population of 63,050. See Appendix “A.” *See also gray highlighted area below.*



The total population of the 166th House of Representatives district has a deviation of -1,003 or -1.57% from the average population of 64,053, per district.

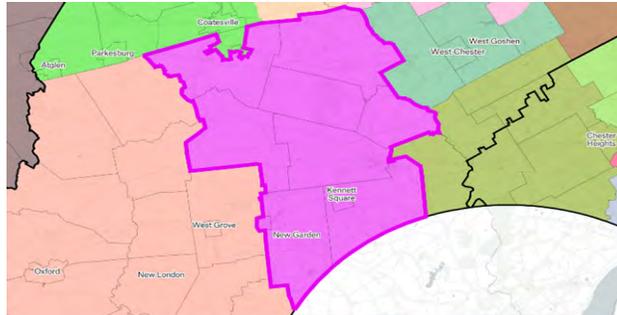
Under the Final Plan, the 160th House of Representatives district consists of “Part of CHESTER County consisting of the TOWNSHIPS of Birmingham, Pennsbury, Thornbury and Westtown and Part of DELAWARE County consisting of the TOWNSHIPS of Bethel, Chadds Ford, Concord and Thornbury and the BOROUGH of Chester Heights” with a total population of 63,956. See Appendix “A.” See also dark green highlighted area below.



The total population of the 160th House of Representatives district has a deviation of -97 or -0.15% from the average population of 64,053, per district.

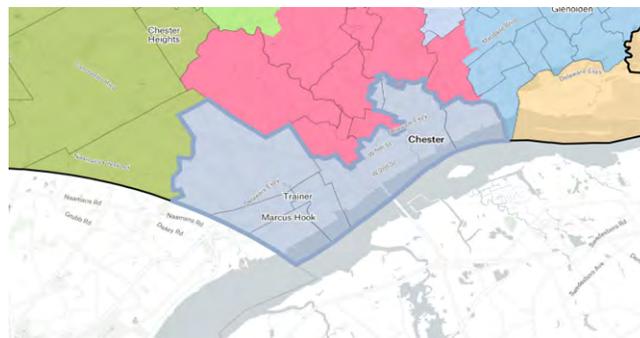
Under the Final Plan, the 158th House of Representatives district consists of “Part of CHESTER County consisting of the TOWNSHIPS of East Fallowfield, East Marlborough, Kennett, New Garden, Newlin, Pocopson, West Bradford and West Marlborough and the BOROUGHS of Avondale and

Kennett Square” with a total population of 62,792. See Appendix “A.” See *also purple highlighted area below.*



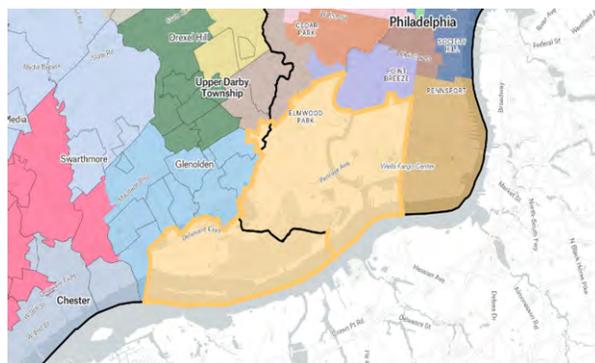
The total population of the 158th House of Representatives district has a deviation of -1,261 or -1.97% from the average population of 64,053, per district.

In addition to the 161st House of Representatives district described above, under the Final Plan, the 159th House of Representatives district consists of “Part of DELAWARE County consisting of the CITY of Chester and the TOWNSHIPS of Lower Chichester and Upper Chichester and the BOROUGHS of Eddystone, Marcus Hook, Parkside and Trainer” with a total population of 61,801. See Appendix “A.” See *also blue/grey highlighted area below.*



The total population of the 159th House of Representatives district has a deviation of -2,252 or -3.52% from the average population of 64,053, per district.

Colwyn Borough and Tinicum Township in Delaware County are now part of the 185th House of Representatives District. Under the Final Plan, the 185th House of Representatives district consists of “Part of DELAWARE County consisting of the TOWNSHIP of Tinicum and the BOROUGH of Colwyn and Part of PHILADELPHIA County consisting of the CITY of Philadelphia (PART, Wards 26, 40 [PART, Divisions 01, 03, 04, 06, 12, 13, 14, 15, 16, 17, 18, 19, 22, 27, 28, 29, 30, 31, 32, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50 and 51] and 48 [PART, Divisions 08, 12 and 17])” with a total population of 61,863. See Appendix “A.” See *also yellow highlighted area below.*



The total population of the 185th House of Representatives district has a deviation of -2,190 or -3.42% from the average population of 64,053, per district. The 185th House of Representatives district is underrepresented in

population by 2,190 people and, like the 159th House of Representatives district, is one of the highest under representations in the Commonwealth.

The “two hundred three representative districts, shall be composed of compact and contiguous territory as nearly equal in population as practicable. ...” Pa. Const. art. II, §16. The population deviations contained in the Final Plan are, at best, on the outer limits of acceptable deviations which further illustrates that the 2021 Legislative Reapportionment Commission made the constitutional directives of Article II, Section 16, subordinate to political and partisan interests. *See Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711 (2012).

In addition, the population deviations overwhelmingly favor historically Democratic districts which are overwhelmingly underpopulated while historically Republican districts are overwhelmingly overpopulated under the Final Plan. Seventy-six percent (76%) of the underpopulated districts are traditional Democratic districts while eighty percent (80%) of the overpopulated districts are traditional Republican districts. This fact further illustrates that the Legislative Reapportionment Commission made the constitutional directives of Article II, Section 16, subordinate to political and partisan interests.

IV. Conclusion.

For all of the reasons articulated herein, it is respectfully asserted that this Honorable Court should enter an Order finding the 2021 Legislative Reapportionment Commission Final Plan to be contrary to law, and further, ordering the Final Plan to be remanded to the Legislative Reapportionment Commission with instructions to eliminate the unnecessary splitting of political subdivisions; to reduce the total population deviation in the districts; to properly count incarcerated prisoners within the population counts of the districts of incarceration; unless presented with a compelling state interest, to refrain from using race as a primary factor in reapportionment; and to utilize the Article II, Section 16 criteria as the primary reapportionment criteria, and further, ordering the 2022 elections for the General Assembly to occur pursuant to the districts adopted in the 2012 Final Plan.

Respectfully submitted,

**DILLON, McCANDLESS, KING,
COULTER & GRAHAM, L.L.P.**

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CERTIFICATE OF COMPLIANCE

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

/s/ Thomas E. Breth
Thomas E. Breth, Esquire

CERTIFICATE OF SERVICE

I certify that this filing was served via PACFile upon all counsel of record this 7th day of March 2022.

/s/ Thomas E. Breth
Thomas E. Breth, Esquire