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In the Supreme Court of Pennsylvania
Middle District

No. 11 MM 2022

KERRY BENNINGHOFF, individually, and as Majority Leader of the Pennsylvania House of Representatives,
Petitioner-Appellant,

v.

2021 LEGISLATIVE REAPPORTIONMENT COMMISSION,
Respondent-Appellee.

On Review of The Legislative Reapportionment Commission's Order Adopting A Final Reapportionment Plan, PA. CONST. art. II, § 17(d)

PETITIONER'S APPLICATION FOR ORDER STRIKING THE NEWLY SUBMITTED EXPERT REPORTS RELIED UPON BY RESPONDENT COMMISSION AND INTERVENOR-RESPONDENT MCCLINTON

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Petitioner respectfully moves this Court for the entry of an order striking the newly submitted expert reports of Drs. Jonathan Rodden, Kosuki Imai, and Matthew Barreto attached to the Consolidated Answer of Intervenor Joanna McClinton to Petitions for Review and relied upon extensively in the Respondent's Briefs filed by Leader McClinton and by Respondent 2021 Legislative Reapportionment Commission ("Commission"). These expert materials were not before the Commission at the time it rendered its vote adopting the 2021 Final Plan, they are not found in the Commission's record, and they go well beyond responding to any updated analysis contained in Petitioner's report of Dr. Michael Barber to address differences in the 2021 Final Plan compared to the 2021 Preliminary Plan. Their inclusion in the record is improper and prejudicial to Petitioner and others, and they should be stricken to assure that this Court decides these appeals in an expedited fashion based on material property in the record.

In further support hereof, Petitioner states as follows:

I. General Background

1. The Commission set forth a process by which it would hear testimony from various experts to support its important work in

reapportioning the state. It set a specific hearing on January 14, 2022 to hear testimony from those experts and a deadline of January 7, 2022 for experts to submit written reports in advance of that hearing. This schedule allowed the Commission to review reports and question experts at the January 14 hearing about those reports to allow for meaningful development of the underlying factual record before the Commission.

2. Petitioner submitted the expert report of Dr. Michael Barber who also testified at the hearing before the Commission on January 14. Both his initial report and testimony were based upon the preliminary apportionment plan that was adopted by the Commission on December 14, 2021 ("2021 Preliminary Plan"). Additionally, the Chairman accepted a written report of another of Petitioner's experts, Dr. Jonathan Katz, dated January 14, 2022.

3. Leader McClinton likewise submitted the expert reports and testimony of three different experts: Dr. Christopher Warshaw, Dr. Kosuke Imai, and Dr. Matthew Barreto. Dr. Barreto also submitted a rebuttal report to Dr. Katz' report on January 18, 2022.

4. On February 4, 2022 the Commission adopted a final reapportionment plan by a 4 to 1 vote ("2021 Final Plan") after rejecting

a proposed amendment by Petitioner by a 3 to 2 vote ("Benninghoff Amendment").

5. On February 17, 2022, Petitioner filed his Petition for Review in this Court asserting that the 2021 Final Plan was contrary to law and violated both the U.S. and Pennsylvania Constitutions. Attached to that Petition for Review was the updated expert report of Dr. Michael Barber. Dr. Barber's updated report simply revised his original report to reflect an analysis of the 2021 Final Plan and the Benninghoff Amendment. He did not perform or provide any new analyses that were not before the Commission with his original report that relied upon, at that time, the 2021 Preliminary Plan.

6. On February 17, 2022, this Court issued an Order requiring all Petitions for Review and any supporting brief be filed by March 7, 2022 and that any consolidated answer and supporting brief from the Commission be filed by March 11, 2022. The Order further indicated that no replies would be accepted and that the Court would base its decision on the briefs and without oral arguments.

7. On March 4, 2022, Petitioner filed an Application for Relief requesting the Court allow reply briefs or oral argument to ensure that

the Court is fully briefed on the pertinent factual and legal issues. The Court denied this request on March 9, 2022. As such, no petitioner will be permitted a reply to any response by the Commission or any other party filed on March 11, nor will there be any opportunity to address any arguments or new evidence raised in those responses at any oral argument.

8. Also on March 4, 2022, Leader McClinton filed her notice of intervention in this case and claimed the right to file her own consolidated answer and brief to all Petitions for Review on March 11, 2022. At this time, Petitioner's request to file a reply brief and for oral argument remained pending.

9. On March 7, 2011, Petitioner submitted his brief demonstrating that the 2021 Final Plan was contrary to law and violated both the U.S. and Pennsylvania Constitutions.

10. On March 9, 2022, Petitioner filed an Application for an Order seeking to have this Court either reject any brief filed by Leader McClinton as not permitted by this Court's February 17, 2022 Order and as likely duplicative of any arguments that would be submitted by the Commission, or, in the alternative, to require Leader McClinton to share

the Commission's 14,000 word limit for briefing.

11. In Leader McClinton's opposition to that Application, she indicated that she needed a separate brief to "respond to baseless claims,[1] including repeated personal references to Leader McClinton and her motives, raised by Leader Benninghoff in his filings, and to Leader Benninghoff's new challenges to the expert testimony which Leader McClinton proffered to the Commission." Leader McClinton further justified her need to file a separate brief claiming that "Leader Benninghoff plainly seeks to shield the new expert reports he submitted to this Court with his brief from fair critique." The Court has not yet ruled upon this Application.

12. With her Answer filed on March 11, 2022, and absent any authority under this Court's February 17 Order, Leader McClinton attached four additional expert reports from Dr. Warshaw, Dr. Imai, Dr.

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[1] Leader McClinton claims in her Answer that Petitioner has "misquoted" her. Not true. Below is the direct exchange cited by Petitioner in his brief: Q: "Democrats spent a record setting amount of money in 2020 to flip the house and lost seats, do you see any chance that [sic] Democrats picking up seats in 2022 and how would that happen? Response: "Redistricting. [pause and laughter] Is that not the answer?" *See* https://s3.us-east-2.amazonaws.com/pagopvideo/634363247.mp4. (visited Mar. 11, 2022).

Barreto, and, a brand new expert, Dr. Jonathan Rodden. Then, only a few hours later and in what must be a coordinated effort, the Commission filed its own brief that extensively cited and referred to those various expert reports. But most of these reports are not simply updates to prior reports like the one submitted by Dr. Barber, but rather, they go well beyond providing any updated critique of Dr. Barber's analysis of the Final Plan.

II. Dr. Imai's March 9, 2022 Report

13. Dr. Imai submitted an initial report to the Commission dated January 7, 2022. That report reflected that the difference between the number of Democratic districts between the 2021 Preliminary Plan and his race-blind simulated plans was "statistically significant." *See* 1.7.22 Imai Report at ¶ 9. Notably, Dr. Imai did not provide a full report of the simulations he conducted by the Commission's January 7, 2022 deadline for written statements. Instead, Dr. Barber appeared at the January 14, 2022 hearing with an additional, much more fulsome report. That report, dated January 14, 2022, however, still reached the same opinion: "Consistent with the main finding of Professor Barber's report, my *race-blind simulation analysis* shows that without any consideration of race,

the preliminary plan yields a greater number of Democratic districts than the race-blind simulated plans." *See* 1.14.22 Imai Report at 6. Indeed, Dr. Imai testified at the January 14, 2022 hearing before the Commission that the 2021 Preliminary Plan was a "statistical outlier" when compared to his set of race-blind maps. LRC.Tr.1508.

14. In a complete about-face, Dr. Imai has now submitted, after all briefs for petitioners were due, a "Supplementary Expert Report" dated March 9, 2022 that is based upon a completely new algorithm that results in an entirely new simulation analysis. In Dr. Imai's second report submitted to the Court with his testimony on January 14, 2022 (his first report submitted on January 7 contained no analysis whatsoever), he states that he "generated 5,000 race-blind simulated plans by considering the aforementioned five criteria alone, using the Sequential Monte Carlo (SMC) simulation algorithm (McCartan and Imai 2020; Kenny et al. 2021)." 1.14.22 Report at 9. In this Supplementary Report, Dr. Imai entirely changes the algorithm that he uses to conduct the simulations. Here he states, "I use the merge-split MCMC algorithm in all of my simulations (Autry et al. 2021; Carter et al. 2019)." 3.9.22 Report at 13. Dr. Imai implements an entirely different algorithm with entirely

different methods, assumptions, and parameters to produce an entirely new set of simulations. As shown in the difference between the results of his second and third reports, the change in methods has a substantial impact on the results he finds.

15. Contrary to his initial analysis, and his testimony before the Commission, Dr. Imai now claims that he was able to reduce the number of municipal splits in his simulations—which were significantly higher in his original simulation when compared to both Dr. Barber's simulation and the 2021 Preliminary and Final Plans—and that, *now*, his *race-blind* simulation contradicts that of Dr. Barber and reflects that the 2021 Final Plan is not a statistical outlier.

III. Dr. Rodden's March 10, 2022 Report

16. Leader McClinton also submits the report of a brand new expert that never submitted any report or testimony before the Commission: Dr. Jonathan Rodden.

17. To begin, since Dr. Rodden never provided any report or analysis, and never testified before the Commission, much of his report is irrelevant. Dr. Rodden spends much of his report attempting to justify the decisions of the Commission to split certain municipalities. But Dr.

Rodden neither provided testimony before the Commission on the justification for these splits, nor was involved in the Commission's decisions. His report on this subject is pure speculation and entirely irrelevant to this Court's determination of whether the 2021 Final Plan is contrary to law and was drawn for partisan advantage by unnecessarily splitting municipality to create more Democratic-leaning seats.

18. Second, Petitioner likewise has no opportunity to respond to this expert report. Dr. Rodden does more than simply respond to or rebut Dr. Barber's conclusions. He affirmatively seeks to justify the Commission's decision and explain the necessity for certain splits despite his complete lack of involvement in the process. Again, because this Court has denied Petitioner the right to any reply or oral argument there is no opportunity to rebut this new evidence submitted after Petitioner filed his brief.

III. Dr. Barreto's March 10, 2022 Report

19. Leader McClinton also submits the report of a now *fourth* report from Dr. Barreto, on top of the January 7, 2022 report, the January 14, 2022 presentation, and the January 18, 2022 rebuttal report, to

address Voting Rights Act issues. It is unclear whether Dr. Barreto's new report contains new data or analysis, but it is equally clear that the opinions in his report could have and should have been presented to the Commission prior to the vote on February 4, 2022.

LAW AND ARGUMENT

20. The inclusion of this extraneous material into this Court's appellate record is contrary to this Court's approach in administrative agency reviews and contrary to the application of those approaches to reviews of final plans. To avoid prejudice to Petitioner and other litigants, and to assure that due process is followed, this extraneous material should be stricken from the record to avoid unfairly contaminating these expedited proceedings.

21. This Court uses administrative law review concepts extensively in defining the scope of its review of Commission final plans under Article II, Section 17 of the Pennsylvania Constitution. It is clear that challenges to a final plan invoke the Court's appellate jurisdiction. *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 724 (Pa. 2012) ("*Holt I*"). Such appeals are governed by Chapter 15 of the Pennsylvania Rules of Appellate Procedures, *id.,* which is titled "judicial

review of governmental determinations." Pa. R.A.P. 1501(a). See also Pa. R.A.P. 3321 (making Chapter 15 applicable to reviews of Commission orders). Furthermore, this Court applies an administrative-exhaustion principle, requiring appellants to first raise their claims before the Commission by way of exceptions to the preliminary plan under Article II, Section 17(c) as a prerequisite to obtaining judicial review of an appeal from the final plan under Article II, Section 17(d). *Holt I,* 38 A.3d at 733 (identifying a "restriction, recognized in *Albert*, that a successful challenge must encompass the Final Plan as a whole, and the recognition in our prior cases that we will not consider claims that were not raised before the LRC."). *See also In re Reapportionment Plan for Pennsylvania General Assembly*, 442 A.2d 661, 666 n.7 (Pa. 1981) (declining to consider contiguity appeal that was "not presented to the Commission").

22. In administrative appeals, it is well settled that a Pennsylvania appellate court will not consider evidentiary material that was not part of the record before the agency at the time it rendered its decision. *See, e.g., Fotta v. Workmen's Compensation Appeal Board,* 626 A.2d 1144, 1147 n.2 (Pa. 1993) (refusing to consider a "revised medical report" from appellant's physician where such report was "not a part of

the record" and the court was confined to "evidence contained in the record"); *Society Hill Civic Ass'n v. Pennsylvania Gaming Control Bd.*, 928 A.2d 175, 178 n.4 (Pa. 2007) (denying application to lodge materials as part of the appellate record that were not included in the record before the Gaming Control Board); *Anam v. Workmen's Compensation Appeal Board*, 537 A.2d 932, 934 (Pa. Cmwlth Ct. 1988) ("when an appellate court is petitioned to review an administrative agency's decision, it may not consider matters not made part of the record before the administrative agency"). For that reason, in *Miller v. Com., Dep't of Public Welfare*, the Commonwealth Court did not hesitate in refusing to consider "statistical studies" submitted in support of an appeal where those studies were not "introduced into evidence at her hearing before the Board." 513 A.2d 569, 570 n.5 (Pa. Cmwlth Ct. 1986).

23. Here, that record is confined to the material identified in Pa. R.A.P. 1951(a), as follows:

> (1) The order or other determination of the government unit sought to be reviewed.
>
> (2) The findings or report on which such order or other determination is based.
>
> (3) The pleadings, evidence and proceedings before the government unit.

Id.

24. Confining judicial review to matters fairly before the Commission is in accord with federal administrative-agency practice, which likewise eschews improper attempts to supplement the record. As the U.S. Supreme Court has held,

> "We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the…decision must be vacated and the matter remanded to him for further consideration.'"

Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 549 (1978) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)); *see also SEC v. Chenery Corp.*, 318 U.S. 80 (1943)); *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) ("[I]n reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record."). "In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp*, 411 U.S. at 142. "The reviewing court is not generally empowered to conduct a de novo inquiry into the

matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

25. This rule prevents the agency from offering "*post hoc* rationalizations" of its administrative decisions during the judicial review process. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962); see also *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359, 367 n.9 (5th Cir.1990) ("The Board's order can be sustained only on the grounds articulated therein."); *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) ("We cannot gloss over the absence of a cogent explanation by the agency by relying on the post hoc rationalizations offered by defendants in their appellate briefs."); *Columbia Broad. Sys., Inc. v. F.C.C.*, 454 F.2d 1018, 1033-34 (D.C. Cir. 1971) (similar).

26. The leading case *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), rejected "litigation affidavits" because "they clearly do not constitute the 'whole record' compiled by the agency." As the Court explained in a recent decision:

> Justice Holmes famously wrote that "[m]en must turn square corners when they deal with the Government." But it is also true, particularly when so much is at stake, that "the Government should turn square corners in dealing with the people." The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted. This is

> not the case for cutting corners to allow DHS to rely upon reasons absent from its original decision.

Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1909-10 (2020) (criticizing newfound policy explanations as "impermissible *post hoc* rationalizations and thus are not properly before us").[2]

I. These New, Extraneous Reports Must Be Struck From The Record

27. Here, Petitioner Benninghoff complied with these requirements in connection with expert testimony. His expert, Dr. Barber, presented comprehensive reports to the Commission on January 7 and 14, 2022 that set forth his methodology, data, analysis, and conclusions, and he testified to the Commission about those matters. His "updated" report, filed on February 17, 2022 with Petitioner's Petition for Review, was updated to reflect changes to the 2021 Final Plan from the 2021 Preliminary Plan, and to provide some analysis of the Benninghoff Amendment, but he utilized the same underlying methodologies and data. The submission of Dr. Barber's "updated" report at the Petition for

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[2] This principle applies in federal practice "regardless whether *post hoc* justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves." *Id.* at 1909.

Review stage was necessary because there was no opportunity to file an exception to the Final Plan prior to its adoption under Article II, Section 17(c) of the Pennsylvania Constitution.

28. The same is not true of the new reports of Dr. Imai and Dr. Jonathan Rodden attached as exhibits to Leader McClinton's Answer, her Consolidated Brief, and quoted extensively throughout the Commission's own brief. Dr. Rodden offered no expert report of any kind before the Commission, even though there was ample opportunity for him to have submitted a report to the Commission rebutting Dr. Barber prior to the Commission's vote. His analysis is entirely new. And as set forth above, Dr. Imai's analysis was not merely an "update" but was also entirely new. He changed computer algorithms (from an SMC algorithm to an MCMC algorithm), employed a new set of model parameters, and re-ran an entirely new set of simulations, all under the guise of trying to generate a set of simulated plans that divides fewer municipalities.

29. None of this new analysis was contained in the Commission record or is fairly derived from analysis that *was* contained in the record. It could not have been considered by the Commission when adopting the 2021 Final Plan because it did not exist. Chairman Nordenberg's March

4, 2022 Final Report does not reference any expert report by Dr. Rodden and it cites only Dr. Imai's January 2022 analysis that the 2021 Final Plan is an outlier when compared to race-blind simulations, but not an outlier once Dr. Imai "factored in racial data." Nordenberg Rep. at 57. In this respect, both Leader McClinton and the Commission attempt to memory-hole Dr. Imai's actual report and findings presented to the Commission (that it relied upon) in favor of newfound findings that look "better" for them before this Court in defense of their gerrymander.

30. Dr. Barreto's new expert report, also relied upon by Leader McClinton and the Commission, does not appear to contain any genuinely new data or analysis, but consists merely of argumentation mostly directed at Petitioner's Petition for Review. To the extent he does offer any new data or analysis beyond what he presented to the Commission in January 2022, such analysis or conclusions were not part of the record and the Commission cannot cite to them as a *post hoc* justification for the Commission's use of racial classifications as a matter of federal law. See, e.g., *Bethune-Hill v. Virginia State Board of Elections*, 137 S. Ct. 788, 799 (2017) (rejecting consideration of legislature's "*post hoc* justifications" in racial-gerrymandering analysis); *Covington v. North Carolina*, 316

F.R.D. 117, 169 (M.D.N.C. 2016) (three-judge court) (analyzing Defendant's basis in evidence for race-based districting and finding that failure to properly analyze issue "during the 2011 redistricting" meant that "Defendants could not have determined any of the challenged districts to be reasonably necessary to cure a potential Section 2 violation").

31. None of this new-found analysis was before the Commission when it considered what became the 2021 Final Plan and when it voted on the 2021 Final Plan. Petitioner and other litigants in these proceedings have had no opportunity to review much less rebut, any of this newfound evidence. The inclusion of such extraneous evidence into the record would unduly prejudice these proceedings and contaminate the record that this Court must use to decide these appeals in an expedited timeframe and without the benefit of oral argument or reply briefing. Therefore, these materials must be stricken from the record.

II. Dr. Imai's New Report Is Also A Radical Departure From His Prior Report That He Testified To And The Commission Relied Upon.

32. The Commission and Leader McClinton's respective reliance on Dr. Imai's new supplemental expert report is completely improper and

prejudicial for the reason that it is improper for an expert to change methodologies and fundamental conclusions in the middle of a litigation.

33. In this case, Dr. Imai's supplemental report is a 180-degree flip from his January 2022 reports and testimony before the Commission. To illustrate the point, consider the shift in Dr. Imai's race-blind simulations. In his initial reports to the Commission, which the Commission relied upon, he produced this histogram comparing the 2021 Preliminary Plan to his simulations:

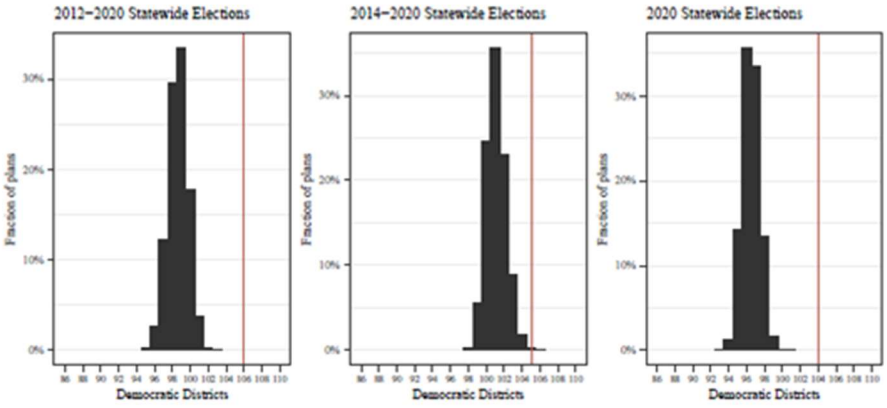

Figure 1: The likely number of Democratic districts across 5,000 *race-blind* simulated plans. Democratic districts are tallied based on an average of statewide elections for the 2012–2020 cycles (left), the 2014–2020 cycles (middle), and 2020 cycle (right). The red vertical lines represent the results under the preliminary plan.

LRC.R001363 (Imai January Report).

34. But now, Dr. Imai's "supplemental" new report used a new set of simulations, a new algorithm, a new set of model parameters, and

whatever other methodological changes he may have made, to produce a totally different and much more favorable simulation range:

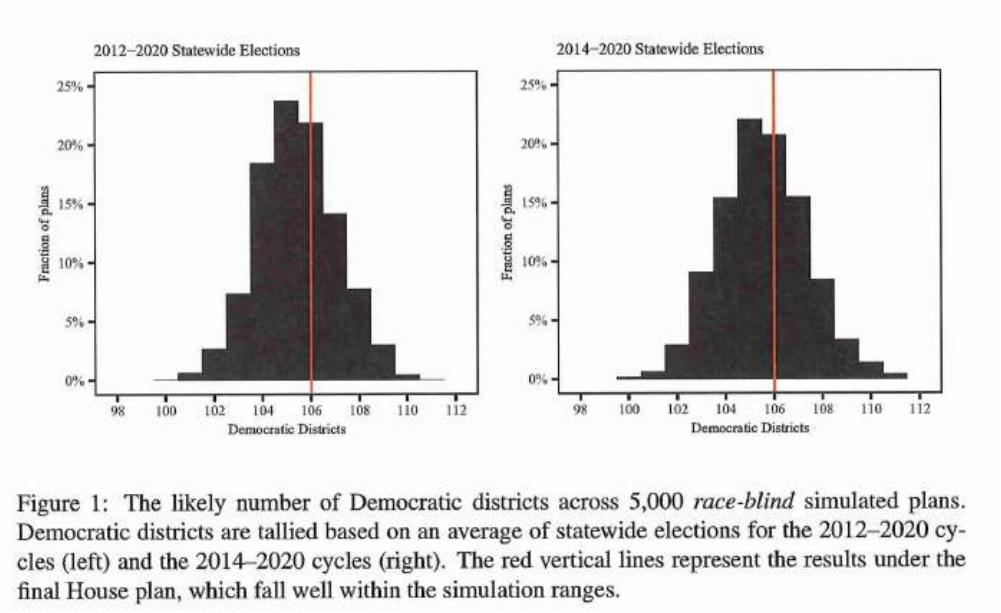

Figure 1: The likely number of Democratic districts across 5,000 *race-blind* simulated plans. Democratic districts are tallied based on an average of statewide elections for the 2012–2020 cycles (left) and the 2014–2020 cycles (right). The red vertical lines represent the results under the final House plan, which fall well within the simulation ranges.

McClinton Br. at Ex. D, Imai Supplemental Rep., at 9.

35. This is a dramatic shift. Dr. Imai's new findings contradict his old findings, and he moved the goalposts (i.e., his histogram range) by *five or six expected Democratic districts* using 2012-2020 data. In fact, the most common range in his original simulation (98-100 Democratic districts) is not even on the chart in the new set of simulations.

36. If this report was presented to a trial court, it would be an obvious violation of the rules, *see Fields v. Samhouri*, 39 Pa. D. & C.4th 225, 234 (Com. Pl. 1999) (holding that an expert's "attempt to completely change the basis of his expert opinion at trial was a clear violation of Rule

4003.5."). Furthermore, Dr. Imai's clear "shift in opinion" raises serious questions about his methodology, reliability, and "professional performance." *Commonwealth v. Flor*, 259 A.3d 891, 904 (Pa. 2021); *see also In re C.T.S.*, No. 1721 MDA 2013, 2014 WL 10937140, at *10 (Pa. Super. Ct. Apr. 1, 2014) ("[A]n expert's opinion must be expressed with reasonable certainty."). The applicable rules of procedure and evidence cannot be more lax in this Court when it is passing upon something as significant as the constitutionality and lawfulness of the 2021 Final Plan that will govern our Commonwealth's voting for the next decade.

37. None of this newfound analysis can be subject to any scrutiny whatsoever, as it was never vetted in the Commission and as this Court has not permitted Leader Benninghoff or any other Petitioner to file a reply brief. Its consideration is manifestly unfair and risks the introduction of wild, unreliable evidence into the record at a time when this Court is attempting to adjudicate the constitutionality and lawfulness of the 2021 Final Plan in an expedited manner.

CONCLUSION

For these reasons, justice and fundamental fairness require that the supplemental expert reports of Drs. Jonathan Rodden, Kosuke Imai,

and Matthew Barreto be stricken from the briefs and answers of the Commission and Leader McClinton and not considered by this Court.

Dated: Philadelphia, Pennsylvania
March 11, 2022

/s/ Jeffry Duffy

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CERTIFICATE 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/ Jeffry Duffy
Jeffry Duffy (PA No. 081670)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the within Application for Relief was served this 11th day of March, 2022, by PACFile on all counsel of record.

/s/ Jeffry Duffy
Jeffry Duffy (PA No. 081670)

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