

BEFORE THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SENATOR JAY COSTA, SENATOR LAWRENCE M.
FARNESE, JR., SENATOR CHRISTINE M.
TARTAGLIONE, SENATOR SHIRLEY M. KITCHEN,
SENATOR LeANNA M. WASHINGTON, SENATOR
MICHAEL J. STACK, SENATOR VINCENT J.
HUGHES, SENATOR ANTHONY H. WILLIAMS,
SENATOR JUDITH L. SCHWANK, SENATOR JOHN
T. YUDICHAK, SENATOR DAYLIN LEACH,
SENATOR LISA M. BOSCOLA, SENATOR ANDREW
E. DINNIMAN, SENATOR JOHN P. BLAKE,
SENATOR RICHARD A. KASUNIC, SENATOR
JOHN N. WOZNIAK, SENATOR JIM FERLO,
SENATOR WAYNE D. FONTANA, SENATOR
JAMES R. BREWSTER, and SENATOR TIMOTHY J.
SOLOBAY,

No. 1 WM 2012

Petitioners,

v.

2011 LEGISLATIVE REAPPORTIONMENT
COMMISSION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR REVIEW

**Appeal from the December 12, 2011 Final Reapportionment Plan and Reapportionment
Map of The 2011 Legislative Reapportionment Commission**

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I. STATEMENT OF JURISDICTION

This appeal is addressed to the Court's appellate jurisdiction and is in the nature of a petition for review, pursuant to Rule of Appellate Procedure 3321. The basis for the jurisdiction of this Court is Section 17(d) of Article 2 of the Pennsylvania Constitution and 42 Pa. C.S. 725(1), which provides that the Supreme Court shall have exclusive jurisdiction of appeals from final orders of certain constitutional and judicial agencies, including the Legislative Reapportionment Commission.

II. DETERMINATION IN QUESTION

The determination for which the Petitioners seek review is the Final Plan of the Commission that was approved on December 12, 2011. A copy of the Final Plan and the map reflecting the Final Plan are provided as Attachments 1 and 2.

III. STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

On review, the Court is to determine whether the Final Plan is contrary to law.

Pa. Const. art. II, § 17(d).

IV. STATEMENT OF THE QUESTION INVOLVED

WHERE THE PENNSYLVANIA CONSTITUTION MANDATES THAT, IN CREATING A LEGISLATIVE REAPPORTIONMENT PLAN, NO COUNTY OR OTHER POLITICAL SUBDIVISION SHALL BE DIVIDED "UNLESS ABSOLUTELY NECESSARY," AND WHERE THE FINAL PLAN REQUIRES NUMEROUS UNNECESSARY DIVISIONS, FOR WHICH THE REAPPORTIONMENT COMMISSION OFFERED NO JUSTIFICATION OR EXPLANATION, WHETHER THE COMMISSION SHOULD BE REQUIRED TO ELIMINATE ALL OF THE UNNECESSARY DIVISIONS.

V. STATEMENT OF THE CASE

A. CONTROLLING CONSTITUTIONAL PROVISION

Legislative reapportionment is a fundamental component of the “one person, one vote” principle and is a critical undertaking to a representative form of government.¹ Prescribing the reapportionment process in Pennsylvania, Article II, Section 16 of the Pennsylvania Constitution states:

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 supplied). To achieve the constitutional goals of “one person, one vote,” and equality of population as nearly “as practicable,” in accordance with the 2010 Federal decennial census population data, the ideal Pennsylvania Senate District should contain 254,048 residents, within “compact and contiguous territory.”² In addition to these requirements, the Constitution mandates that political subdivisions shall not be divided “**unless absolutely necessary.**”

¹ See *Reynolds v. Sims*, 377 U.S. 533, 560-61, 578 (1964) (United States Supreme Court established the “one person, one vote” doctrine and required states to make a good faith effort to construct legislative districts as nearly equal in population as “practicable”). Article II, section 16 of the Pennsylvania Constitution was adopted in 1968 as a response to the Court’s directive.

² The census determined that the population of Pennsylvania is 12,702,379. Thus, the ideal Senate District should contain 254,048 residents and the ideal House District should contain 62,573 residents. The census data also identified a need to move one senatorial district from the west to the east. (Statement of the Honorable Jay Costa Concerning the Preliminary Plan, dated November 23, 2011, provided as Petitioners’ Appendix E at 3). Citations to “App. ___ at ___” are to the Appendices that the Petitioners have provided to the Court with this Brief and that were provided to the Commission in the course of the reapportionment proceedings.

B. PROCEDURAL BACKGROUND

1. Establishment Of The Reapportionment Commission

Pursuant to Section 17(a) of Article II of the Pennsylvania Constitution, in 2011, the year following the 2010 Federal decennial census, the 2011 Pennsylvania Legislative Reapportionment Commission (“Commission”) was established for the purpose of reapportioning the Commonwealth. The Commission is composed of Senator Dominic Pileggi, the majority leader of the Senate; Senator Costa, the minority leader of the Senate; Representative Michael Turzai, the majority leader of the House of Representatives; Representative Frank Dermody, the minority leader of the House of Representatives; and the Honorable Stephen McEwen, the fifth member who this Court selected when the other Commission members were unable to agree on a fifth member. The Commission’s stated goal was to accomplish the reapportionment in a fair, open and thoughtful manner, consistent with the requirements of the Pennsylvania Constitution. (App. D at 9).³ The Chair of the Commission expressed the view that reapportionment should generally allow for continuity and that seats of existing members should be retained in favor of vacant seats to allow for political neutrality, consideration of communities of interest of the constituents and consistency with the Constitution. (App. B, 10/31/11 Tr. 245, 255).⁴

³ Statement of the Honorable Jay Costa Concerning the Preliminary Plan, dated November 18, 2011, provided as Petitioners’ Appendix D.

⁴ The October 31, 2011 transcript is provided as Petitioners’ Appendix B. This transcript, the November 18 and 23, 2011 Hearing Transcripts and the December 12, 2011 Commission meeting transcript are cited as “1 / __ /11 Tr. __.”

At its May 11, 2011 organizational meeting, the Commission selected the Honorable Joseph A. Del Sole to serve as Chief Counsel to the Commission.⁵ In advance of the Commission's first hearing, Judge Del Sole supplied the Commission with an overview of the process the Commission was to undertake.⁶ He explained the legal framework for reapportionment set forth in Article II, Section 16 of the Constitution, emphasizing the constitutional directive to create districts that are composed of "compact and contiguous territory as nearly equal in population as practicable" and the mandate that, "[u]nless absolutely necessary, no county, city incorporated town, borough, township or ward shall be divided." Pa. Const. art. II, § 16. He emphasized the Commission's responsibility "to formulate a plan which, as a whole, effectuates each of these constitutional touchstones." (App. A at 3). Judge Del Sole also explained the history of the Court's evaluation of the "unless absolutely necessary" provision and cautioned that splitting political subdivisions may result in increased scrutiny. He thus suggested that the Commission should provide "concrete justifications" for any divisions included in the reapportionment plan. (App. A at 18).

2. Presentation Of The Preliminary Plan

Following the establishment of the Commission and the certification of the census data in August 2011, throughout the late summer and early autumn, the Commission members had limited, informal discussions with regard to certain adjustments to the then-current district maps, with the apparent goal of achieving equitable and collective adjustments for the

⁵ Commission Resolution No. 1A-5-11-2011.

⁶ See August 11, 2011 Memorandum from Del Sole Cavanaugh Stroyd LLC to the Legislative Reapportionment Commission, titled "Legal Issues Implicated by the 2011 Decennial Legis. Reapportionment of the Commw. of Pa.," provided as Petitioners' Appendix A.

reapportionment.⁷ The Commission conducted two public hearings, intended to “elicit testimony from citizens concerning their view on reapportionment.”⁸ Hearings were held on September 7, 2011 in Allentown and in Pittsburgh on September 14, 2011.⁹ The Commission did not present or discuss any specific reapportionment plans at these meetings.

A Commission meeting was scheduled for October 31, 2011 for the purpose of voting on a preliminary plan (“Preliminary Plan”). Thirty minutes before the time scheduled for the vote, the Senate and House majority leader Commissioners presented a plan that was radically different from any plan the full Commission had previously reviewed or discussed. The Preliminary Plan had never been presented to the Senate and House minority leader Commissioners, or to the public, for consideration, scrutiny or even review. (11/18/11 Tr. 256). Even a cursory review of the Plan made clear that it contained a variety of divisions that had never been discussed and which were created only for partisan purposes. (App. B, 10/31/11 Tr. 257-58). The Senate and House minority leader Commissioners were provided only a thirty-minute recess before being required to vote on the majority members’ Plan. (App. B, 10/31/11

⁷ The Commission did not receive census data in a usable form until August 17, 2011. With the certification of the census data, it was confirmed that the ideal Senate District should include 254,048 residents and the ideal House District should include 62,573 residents and that one district should be moved from the western region to the eastern region.

⁸ Commission Resolution No. G-8-17-11.

⁹ Many of the individuals who attended the Allentown hearing complained of the previous reapportionment which had left Monroe County divided among 6 Senate Districts and asked that the Commission find a means to adhere to the county boundaries in reapportioning districts.

Tr. 246). Commissioner Senator Costa decried the process imposed, stating that the Preliminary Plan was a “rare and raw political partisan exercise.”¹⁰ (App. B, 10/31/11 Tr. 258).

The Commission approved the Preliminary Plan by a 3 to 2 vote, over the strong objections of Senator Costa and Representative Dermody to both the significant deficiencies in its development and to the substantive failures of the Plan to comply with the Constitution’s requirements. (App. B, 10/31/11 Tr. 249).

3. Significant Deficiencies Of The Preliminary Plan

The Preliminary Plan included a variety of deficiencies that reflected a failure to adhere to the requirements of the Constitution or to the goals the Commission Chair had outlined at the outset of the process, including the following issues.

a) Unnecessary Division Of Counties And Political Subdivisions, Generally

The Preliminary Plan provided for divisions within 28 of Pennsylvania’s 67 counties. (Preliminary Plan Map, App. J; App. D, Ex. 2). Of these 28 counties, at least 26 contained more Senate Districts than required under the equal population standard of 254,048 residents per district. (App. D, Ex. 2).¹¹ Twelve of these counties contained at least two more senatorial districts than necessary and four counties contained three more Senate Districts than necessary. (App. D, Ex. 2). Montgomery County was divided among seven different Senate Districts, yet no single district included more than 24% of that county’s residents. (Preliminary

¹⁰ Similarly, Commission member Representative Dermody noted “political fairness does not exist in our view right now for the length of time we’ve had to review the Republican Plan.” (App. B, 10/31/11 Tr. 248).

¹¹ Snyder County, with a population of 39,702 and two Senate Districts, should have been designated as a county with an excess number of Senate Districts. (See App. D, Ex. 2).

Plan Map, App. H, Ex. 12). Monroe County, by contrast, was fully contained within a single Senate District, without division. (App. D, Ex. 2).¹²

b) Division, By Precinct, Of Two Delaware County Municipalities – Upper Darby Township And Darby Township

Other than the cities of Philadelphia and Pittsburgh, the Preliminary Plan divided only two municipalities in the entire Commonwealth – Upper Darby Township and Darby Township, both in Delaware County. (Preliminary Plan Map, App. J). Of 71 total precincts in Upper Darby Township, the Preliminary Plan proposed moving 24 precincts from Senate District No. 26 into Senate District No. 8. The distinguishing characteristic of 17 of the 24 precincts removed is that they contain an African American population of at least 50%. (App. E, Ex. 9). Only two precincts with that same characteristic would remain in District No. 26. (App. B, 10/31/11 Tr. 262). In respect to Darby Township, the Preliminary Plan proposed placing two of the Township's five wards into Senate District No. 8. The distinguishing characteristic of those two wards is that they contain 75 Caucasian residents, out of 3,471 residents, or 2%. The three wards in Senate District No. 26, by contrast, contained 4,253 Caucasian residents out of 4,753 residents or 89%. (App. E, Ex. 9).

c) The Redrawing Of Senate District No. 15 To Divide It Among Five Counties And To Remove The City Of Harrisburg From Its Historical Inclusion In That District

The Preliminary Plan redistributed Senate District No. 15 among five different counties, Dauphin, Perry, Cumberland, Adams and York, creating a horseshoe-shaped district that circled – but excluded – the City of Harrisburg. (App. D, Ex. 6). Harrisburg, both the state

¹² The ease with which the drafters of the Preliminary Plan included Monroe County, with a population of 169,842, in a single district, was a striking contrast to other divisions contained in the Preliminary Plan and apparently reflected a response to the testimony at the Allentown hearing where witnesses had expressed concerns that Monroe County not be unnecessarily divided as it had been in 2001.

capital and the county seat of Dauphin County had, historically, been included in District No. 15. (App. D, Ex. 5).

d) The Relocation Of Senate District No. 45 From The Mon Valley In The West To Monroe County In The East

The data from the 2010 Federal census indicated that, due to shifts in population, one senatorial district would have to be moved from the western part to the eastern part of the Commonwealth. Commissioner Pileggi, who acknowledged drafting the Preliminary Plan for the Senate, without any input from Commissioners Costa and Dermody, chose to move Senate District No. 45, comprised of communities in the Mon Valley and represented by Senator Brewster, from the historic Mon Valley region in western Pennsylvania to Monroe County in the east. (App. B, 10/31/11 Tr. 256). He attempted to justify the selection of Senate District No. 45 by noting Senator Brewster's lack of seniority. The elimination of Senate District No. 45 would have the effect of distributing the Mon Valley communities among the various different districts, frustrating the concerted rebuilding efforts Senator Brewster has led. (11/18/11 Tr. 331; App. L).

4. Public Hearings And Comments On The Preliminary Plan

The Commission conducted public hearings on the Preliminary Plan on November 18 and November 23, 2011 and allowed for the submission of written testimony and comments. In the course of the hearings, witnesses from across the Commonwealth testified regarding their concerns as to the various deficiencies of the Preliminary Plan, including the significant issues identified. Almost uniformly, witnesses urged the Commission to refrain from dividing their political subdivisions. They complained of arbitrary divisions that diminished the political voices of their communities and made interaction with the Commonwealth a difficult and fragmented process. Those who favored the Preliminary Plan typically did so because the Plan respected the boundaries of their particular political subdivision.

a) Unnecessary Division Of Counties

A number of witnesses whose political subdivisions the Preliminary Plan divided testified to the importance of keeping political subdivisions intact and not dividing smaller counties unnecessarily. These witnesses asked the Commission to make appropriate adjustments to the Preliminary Plan to eliminate divisions where possible. (*See, e.g.*, 11/18/11 Tr. 284, 363). Government officials described the difficulties inherent in seeking grants or support for projects when district boundaries divide counties and municipalities. (11/18/11 Tr. 286).

Commissioners from counties with small populations described how dividing a county reduces the voters of that county to afterthoughts in the minds of legislators. Perry County Commissioner, Brenda Benner, explained that dividing a county like Perry, with a population of only 45,000 residents, into three different Senate Districts compounds the difficulty of coordinating projects with multiple Senators who are also responsible to constituents in other counties. (11/18/11 Tr. 286). Under the Preliminary Plan, Perry County residents would comprise no more than 6% of the population in any of the districts covering the County. (11/18/11 Tr. 285). Thus, Ms. Benner testified, the various Senators for those multiple districts could easily lose touch with all of Perry County's residents. (11/18/11 Tr. 285). Pamela A. Tokar-Ickes, Chairwoman of the Somerset County Board of Commissioners, echoed this significant concern, noting that Somerset County, with a population of only 77,742, would also be divided among three Senate Districts, making Somerset County "the tagalong to everyone else's senatorial district." (11/18/11 Tr. 352).

b) Unnecessary Division Of Upper Darby Township And Darby Township

A number of witnesses questioned the Preliminary Plan's division of Upper Darby and Darby Townships by precinct and implored the Commission to make appropriate

adjustments to eliminate the divisions and to keep those Townships contained within the same district. (11/18/2011 Tr. 311-27). Representative Margo Davidson questioned why the Commission had determined that the Townships should be split, despite the Constitution's clear directives. (11/18/11 Tr. 312). She criticized the Commission for its failure to observe race-neutral principles in creating these divisions. (11/18/11 Tr. 314). Although seven witnesses from Delaware County who shared Representative Davidson's concerns were permitted to testify, several others were denied an opportunity to speak. (11/18/11 Tr. 309). One of those permitted to testify complained of the "packing" of African Americans in the plan for House districts, stating, "it's even worse on the Senate side, where two districts . . . that are largely African American were moved into [District 8] in west Philadelphia." (11/18/11 Tr. 320).

c) Redistribution Of Senate District No. 15 Into Five Counties And Exclusion Of The City of Harrisburg

County Commissioners from each of the five counties with portions of the new, horseshoe-shaped Senate District No. 15, which excluded Harrisburg, presented letters to the Commission explaining their concerns about this unprecedented division. (11/18/11 Tr. 282). They all questioned whether one Senator could adequately represent citizens from each of five counties. Patty Kim, Vice President of the Harrisburg City Council, also testified about the "perplexing" removal of Harrisburg from its historical place in the district, describing that the new district would "wind its way through primarily rural portions of five counties and encompass two mountain ranges, three state parks, and measure about 170 miles from one end of the horseshoe to the other." (11/18/11 Tr. 291-92).

d) Elimination Of Senate District No. 45 From The Mon Valley

A number of witnesses challenged the Preliminary Plan's scheme for tearing apart the historic communities of the Mon Valley in the west by relocating Senate District No. 45 to

Monroe County. They described the unique community of interest that Senate District No. 45 encompasses and the common bond of the political subdivisions in the Mon Valley, a region formerly described as having “[g]lows that fire the nation’s economy.” (11/18/11 Tr. 342). As a region at the center of the rust belt, the Mon Valley communities all shared in the decline of the steel industry that shook the region in the 1980s. During this decline, Representative Bill Kortz explained, the unifying effect of Senate District No. 45 “provided a stabilizing force in the midst of this crisis and the rebuilding efforts that are continuing even until today.” (11/18/2011 Tr. 330). These witnesses made clear that relocating Senate District No. 45 would counteract the recent success of the rebuilding efforts taking shape in the region.

The Mon Valley witnesses also commended the hard work and effective leadership of District No. 45’s Senator Brewster to create momentum for the Mon Valley. They described the recent multi-million investments in the region and its journey back to success and credited Senator Brewster for being the “driving force,” and “a man of vision. . . a man of an ability to see the big picture. . . a man who makes things happen.” (11/18/11 Tr. 330, 335).

C. SENATOR COSTA’S STATEMENTS AND EXCEPTIONS TO THE PRELIMINARY PLAN

1. November 18, 2011 Statement And Evidence Presented To The Commission

At the public hearing on November 18, 2011, Commissioner Senator Costa delivered a statement regarding the Preliminary Plan. (App. D). Senator Costa described how the Republican members of the Commission had presented the Preliminary Plan only thirty minutes before a vote on the plan. Although Senator Costa and Representative Dermody were under the impression that the Commission intended to discuss and undertake limited adjustments to the existing map, Senator Costa stated that he had been stunned when the Senate and House majority leader members presented a plan that was radically different from any of the concepts

that the Commissioners had previously discussed. (App. D at 3). The Preliminary Plan the Republican members submitted had the effect of increasing Republican performance in 14 of the 19 competitive Senate Districts. (App. D at 5). To achieve this increase in partisan performance, as Senator Costa noted, the Preliminary Plan “turned a blind eye to the requirements of the Pennsylvania Constitution.” (App. D at 5). He challenged his fellow Commissioners to explain how the divisions contained in the Preliminary Plan could be deemed “absolutely necessary.”

Senator Costa described how the Preliminary Plan divided far too many counties and offered an exhibit demonstrating how many Senate Districts should be placed in each county. (App. D, Ex. 2). Starting from the premise that each Senate District should contain 254,048 residents, Exhibit 2 depicts how many districts each county should contain, based on the certified population for that county. Senator Costa explained that, based on the ideal district population, over one-third of Pennsylvania’s 67 counties contained at least one more Senate District than necessary. (App. D at 6, Ex. 2). Under the Preliminary Plan, 26 counties would have been divided among at least one more Senate District than the population of the county could justify. (App. D, Ex. 2).¹³ Twelve counties were divided among at least two more Senate Districts than the population of the county could justify. (App. D, Ex. 2). Montgomery County was split among seven counties, with three more divisions than the population could justify. (App. D, Ex. 2). In total, the Preliminary Plan contained at least 42 more divisions than could be justified solely on the basis of population. (App. D, Ex. 2).¹⁴

¹³ Thus, if a county has a population less than 254,048, it could be served by a single Senate District. If, for example, it had a population of 300,000, it could be served by two districts. Excess divisions exist if that county with 300,000 residents were to be divided among three or more districts.

¹⁴ This is referenced by the number of excess divisions and also included Snyder County.

As one of the most egregious examples of political subdivision splits, Senator Costa also presented evidence regarding how the Preliminary Plan divided the precincts of Upper Darby Township and Darby Township. (App. D, Exs. 3 and 4). Senator Costa explained the effect of the removal of 24 Upper Darby precincts – including 17 precincts with African American populations of at least 50% – from Senate District No. 26 to Senate District No. 8, a district with an existing African American majority population in Philadelphia. (App. D, Ex. 4). He presented, as Exhibit 4, a map that depicts the effect of these precinct divisions. (App. D, Ex. 4). Senator Costa suggested that the only apparent reasons for the divisions by precinct were race and partisan gain, and not any justifiable necessity. (App. D, Exs. 3 and 4; 11/18/11 Tr. 262). Because no appropriate justification exists for the removal of these precincts, Senator Costa urged the Commission to reunify Upper Darby and Darby Townships. (11/18/11 Tr. 262).

Senator Costa also described how Senate District No. 15 was a prime example of how the Preliminary Plan chose “partisanship at the expense of constitutional principles.” (11/18/11 Tr. 262). Senator Costa provided exhibits comparing Senate District No. 15, as drawn in 2001, to the district as drawn in the Preliminary Plan. (App. D, Exs. 5, 6). Senator Costa asked the Commission to offer any possible justification for an adjustment that disbursed a previously compact district into five counties. He noted that the adjustment proposed in the Preliminary Plan would dilute the voice and influence of Harrisburg at a time when relationship between Harrisburg and Dauphin County is more important than ever. (11/18/11 Tr. 263).¹⁵

¹⁵ The removal of African American precincts in Delaware County from Senate District No. 26, a swing district, to Senate District No. 8, a predominantly African American district, stands in stark juxtaposition to the detachment of the City of Harrisburg from most of the rest of Dauphin County’s Senate District No. 15 to Senate District No. 48, covering a rural population in Lebanon County. Given this flagrant disregard for the preservation of political subdivisions, the motivation is apparent upon reviewing the electoral impact of these divisions. With the Preliminary Plan, the expected Democratic performance for Senate District No. 15 is decreased by 8.1%, from 43.6% to 35.5%. The Democratic performance for

Senator Costa also demonstrated how relocating Senate District No. 45 would have the effect of leaving the citizens of the Mon Valley without a real voice in the Senate. (11/18/11 Tr. 264). Removal of Senate District No. 45 to Monroe County, “dissolved the region’s historical communities of interest” and “whipsawed” its interests. (11/18/11 Tr. 264-65). Senator Costa reminded the Commission that alternatives were available that would be consistent with the goals the Commission had outlined and that would provide “the opportunity to address the criss-crossing design of [the] partisan-motivated districts.” (11/18/11 Tr. 265).

2. November 23, 2011 Statement And Evidence

At the November 23, 2011 hearing, Senator Costa submitted additional comments and exhibits to the Commission. Senator Costa asked the Commission to engage in a “serious, thoughtful and constructive dialogue” to address the testimony the Commission had received from the public.¹⁶ Senator Costa reminded the Commission members of their obligation to at least consider the public comments in response to the Preliminary Plan. (App. E at 3).

Senator Costa presented additional exhibits as to the deficiencies of the Preliminary Plan regarding the division of Upper Darby Township and Darby Township. Exhibit 9 indicates that Upper Darby contains 71 precincts, including 19 precincts with an African American population of at least 50%. Of the 19 precincts with this characteristic, Exhibit 9 demonstrates that the Preliminary Plan moved 17 precincts from Senate District No. 26 and into Senate District No. 8, an already effective majority-minority district in Philadelphia, with no

Senate District No. 48 was adjusted from 32.7% to 40.7%. The division of the City of Harrisburg was thus undertaken solely to eliminate a competitive district. (App. E, Ex. 7).

¹⁶ See November 23, 2011 Counter Statement of the Honorable Jay Costa Concerning the Preliminary Reapportionment Plan for the Pennsylvania Senate, included in the record as “Costa Statement No. 2,” provided as Petitioners’ Appendix E.

apparent, constitutionally valid basis. (App. E, Ex. 9). Only two precincts with the same characteristic remained in Senate District No. 26. (App. E, Ex. 9).¹⁷

Senator Costa also provided the Commission with Exhibit 8, which sets forth the number of county divisions contained in the Preliminary Plan, as compared to the population of those counties, and identifies the appropriate number of divisions, based on population. (App. E, Ex. 8). Exhibit 8 demonstrates that numerous counties, including the horseshoe-shaped Senate District No. 15 of the Preliminary Plan, was significantly less compact than the 2001 reapportionment plan.

3. Commissioner Senator Costa's Exceptions To The Preliminary Plan

On November 30, 2011, Senator Costa submitted written exceptions to the Preliminary Plan to the Commission's Executive Director and the other Commissioners. (App. F). His Exceptions summarized the objections to the Preliminary Plan that he had explained at the public hearings.

4. The Commission's Failure To Meaningfully Consider Public Comments And Other Factors Relating To Necessity

Despite Senator Costa's request that the Commission consider the public's concerns, the Commission failed even to implement a structure for consideration of public testimony and written comments. (12/12/11 Tr. 478).¹⁸ The Commission did not even provide a process to reconcile public comments with the change from the Preliminary Plan nor did the Commission ever meet to discuss the public comments, consider the exceptions or examine

¹⁷ The division and relocation of predominantly African American precincts from Senate District No. 26 to Senate District No. 8 was not required under the Voting Rights Act, 42 U.S.C. § 1973, because the minority voters in Senate District No. 8 had elected a minority representative of their choosing for years.

¹⁸ See December 12, 2011 Comments of Senator Jay Costa to the Commission, provided as Petitioners' Appendix G.

whether numerous divisions of political subdivisions were absolutely necessary. It also failed to consider the impact of potential retirement of incumbent Senators when identifying which western-based Senate District should be relocated. It failed to openly address and consider the distinct impact on the communities that would lose an incumbent Senator, as compared to one in which a new Senator would be elected due to a pending retirement. Like many other factors, this information was not sought and, when presented, not pursued.

5. The Alternative Plan

In an effort to respond to the concerns that the Final Plan contains unnecessary divisions of political subdivisions in violation of Article II, Section 16, Senator Costa presented to the Commission an alternative plan that addressed both the constitutional requirements and incorporated the public comments. (“Alternative Plan”). (App. K). The Alternative Plan significantly reduced the number of divisions of political subdivisions and was essentially politically neutral, effectively maintaining the political outcomes reflected in the Preliminary Plan, without significantly altering the population deviations. (App. H, Ex. 10).¹⁹ The Alternative Plan also met the equal protection standard this Court established.²⁰

¹⁹ As Senator Costa had explained, 19 of the 50 Senate Districts can be categorized as “competitive,” with neither party having a mean performance ratio below 45% or above 55%. This outcome took place despite the fact that Republicans hold a 30 to 20 advantage in the Senate, in a state with 4 million registered Democrats, compared to 3 million registered Republicans. (App. D at Ex. 4). The Preliminary Plan increased Republican performance in 14 of 19 of the competitive districts. To focus on the constitutional elements, the Alternative Plan generally maintained existing districts while reducing unnecessary divisions. Further, the Alternative Plan, like the Final Plan, would increase Republican performance in 14 of the 19 competitive districts. (App. H, Ex. 13).

²⁰ In *Albert v 2001 Legislative Reapportionment Commission*, 567 Pa. 670, 790 A.2d 989 (2002), this Court held that a total range of deviation from the ideal Senate District of 3.98% and from the ideal House District of 5.54% would be appropriate to address equal protection concerns. The Alternative Plan allowed for a deviation of 4.16% as compared to the 3.89% in the Final Plan. (App. G at 2; Final Plan, Attachment 1). Thus, both plans were in the range this Court has found to be appropriate.

Before the Commission voted on the Final Plan, Senator Costa presented the Commission with the Alternative Plan. The Commission thus had the opportunity to reduce the number of county and municipal divisions. The Alternative Plan reflected how numerous political subdivisions that the Preliminary Plan divided could remain intact, even while preserving the general electoral performance characteristics of the districts that the Preliminary Plan created.²¹ The Alternative Plan does not require the division of 9 counties that would be divided under the Final Plan. Each of these counties – Adams, Carbon, Clinton, Franklin, Lawrence, Perry, Snyder, Somerset and Washington – has a population of fewer than 254,048 residents. Under the Final Plan, each would be subject to division. (App. G at 2; App. H, Ex. 10). The Alternative Plan thus shows that these divisions are not “absolutely necessary.”

The Alternative Plan demonstrates that the division of Upper Darby and Darby Townships’ precincts was not absolutely necessary and that all of the precincts in those municipalities could remain in one single Senate District without affecting the population deviation of the affected district or of the Final Plan as a whole. (App. G at 2; App. H, Ex. 10).

The Alternative Plan depicts how the drastic alterations of Senate District No. 15, including the removal of the City of Harrisburg, with its predominantly African-American population, were not absolutely necessary. Under the Alternative Plan, Harrisburg remains in its historic place in Senate District No. 15. (App. K).

²¹ In addition to preserving overall electoral performance, retaining the same number of incumbent Senators and meeting the equal population standard, the Alternative Plan maintained the same number of minority-based districts, consistent with the Voting Rights Act.

The Alternative Plan also demonstrates that the selection of Senate District No. 47 for relocation to the east, instead of Senate District No. 45, would allow for the reduction of the number of divisions of political subdivisions.²²

D. RELEVANT PROVISIONS OF THE FINAL PLAN

1. Approval Of The Final Plan

At the December 12, 2011 Commission meeting, Senator Costa presented the Alternative Plan for approval. The Commission rejected the Alternative Plan with a vote of 3 to 2, with Senator Costa and Representative Dermody supporting its approval. (App. I, 12/12/11 Tr. 481). Without any analysis or consideration of the alternatives for eliminating divisions of political subdivisions, the Commission voted, 4 to 1, to approve the Final Plan. (App. I, 12/12/11 Tr. 489-90).

2. Divisions Of Counties

Under the Final Plan, 28 counties continue to be divided with a total of 39 excess divisions. As the Alternative Plan demonstrated, however, the same characteristics could be preserved with only 28 excess divisions over 23 counties. (App. H, Ex. 10).²³ For example, Montgomery County has a population of 799,874 residents, sufficient for 3.15 ideal Senate Districts, based on the 254,048 resident standard. In the Final Plan, Montgomery County contains portions of seven different Senate Districts and thus, has three excess splits. The Commission offered no justification, explanation or testimony as to why at least 11 of the Final Plan's divisions were "absolutely necessary" under any of the requirements of the Constitution.

²² Under the Final Plan, Senate District No. 47 covers Beaver, Butler and Lawrence Counties. In contrast, under the Alternative Plan, Senate District No. 45 is completely contained within Allegheny County. (App. G, Ex. 12; App. K).

²³ Petitioners' Appendix H is Senator Costa's December 30, 2011 letter to the Commission, which included three exhibits that supplemented his testimony at the December 12, 2012 Commission meeting.

3. Divisions Within Upper Darby Township And Darby Township

The Final Plan also maintained the divisions of Upper Darby Township and Darby Township, by precinct. The Alternative Plan demonstrated that the division of those Townships is not necessary. (App. K). Yet, the Final Plan did not alter those divisions and the Commission offered no concrete justification, explanation or testimony as to why the divisions were “absolutely necessary” under any of the requirements of the Constitution.

4. Division Of The City Of Harrisburg From Dauphin County

The Final Plan reflected some compaction of Senate District No. 15. However, it continued to exclude the City of Harrisburg, a predominantly African-American community, from Dauphin County and from the district. In addition to dividing Dauphin County, the Final Plan divides Senate District No. 15 among Adams, Lancaster and York Counties. Lancaster County would continue to be divided among at least one more Senate District than necessary and both Adams and York Counties would be divided among two more Senate Districts than necessary. (App. H, Ex. 10). The Commission offered no justification, explanation or testimony as to why these divisions would be “absolutely necessary” under the Constitution.

5. Movement Of One Senate District

Despite the testimony presented and the historic community of interest represented, the Final Plan moved Senate District No. 45, a Democratic performing district, to create a new district in Monroe County, a Republican performing area. (App. H, Ex. 13).²⁴ Although the Commission had alternative options, in the Final Plan, Senate District No. 45 was moved to Monroe County. The Commission cited no basis for this aspect of the Final Plan.

²⁴ With the relocation of Senate District No. 45 from Allegheny County to Monroe County, the Democratic performance of that district would be reduced from 52.7% to 46.4%.

6. The Commission Failed To Provide Concrete Justification For Divisions That Were Documented To Be Unnecessary

The Alternative Plan offered a statewide plan for reapportionment with: 1) the same electoral performance standard as the Final Plan; 2) essentially the same districts; 3) a similar population deviation, both within the limits this Court has found to be constitutional; and 4) a neutral plan with respect to the creation of minority-based districts under the Voting Rights Act. **The only difference between the Alternative Plan and the Final Plan is that the Alternative Plan eliminated 11 unnecessary county divisions and two unnecessary municipal divisions.**²⁵ The Alternative Plan contained “excess splits” of 28 political subdivisions compared to the Final Plan which contained 39 excess splits of counties and two excess splits of municipalities. Thus, even maintaining the same characteristics and anticipated voter performance outcomes, the Alternative Plan demonstrated that the Final Plan contained at least 13 unnecessary divisions. Despite the clear advice of the Commission’s Counsel that the Commission should provide “concrete justifications” for any division in the reapportionment Plan, the Commission simply failed to do so. (App. A at 18). Because the Final Plan contains at least 13 divisions that are not “absolutely necessary,” the Final Plan does not comply with the mandate of the Pennsylvania Constitution.

E. PETITIONS FOR REVIEW

On January 10, 2012, all of the Democratic Senators for the Commonwealth of Pennsylvania joined in filing a Petition for Review of the 2011 Final Reapportionment Plan with this Court. Other petitioners from areas that the Final Plan affects have also filed appeals.

²⁵ There were 16 county divisions removed and 5 created for a net of 11 unnecessary divisions between the Alternative Plan and the Final Plan. (App. H, Ex. 10). Exhibit 10 does not reflect excess splits of Upper Darby Township and Darby Township.

VI. SUMMARY OF ARGUMENT

Article II, Section 16 of the Pennsylvania Constitution governs the reapportionment process in Pennsylvania and mandates that no county or municipality shall be divided and placed in separate districts “unless absolutely necessary.” This Court has consistently held that mandatory directives must be followed. The Final Plan the Commission approved contains numerous divisions of counties and municipalities that are not absolutely necessary. Unlike past reapportionment proceedings, evidence presented to the Commission identified excess divisions beyond those required to meet the Constitutional requirement that districts be composed of compact and contiguous territory as nearly in population “as practicable.” In addition to the statewide statistical data, the Alternative Plan specifically identified the unnecessary splits of 11 counties and two municipalities.

The Commission made no attempt to meet its constitutional obligation or to review or address why the Final Plan maintained demonstrably unnecessary splits of political subdivisions. In fact, the Commission never met to address the numerous public comments, which had the common theme of allowing political subdivisions to remain intact to allow for a single senator or representative. Without justification of the unnecessary splits, and with the statistical data and clear opportunity to eliminate unnecessary divisions set forth in the Alternative Plan, the Commission’s approval of the Final Plan violated the clear provisions of the Constitution. Accordingly, this Court should remand this proceeding to the Commission to eliminate the unnecessary divisions. With the availability of modern technology and computers, the Commission could make the constitutionally mandated adjustments within a few days.

VII. ARGUMENT

A. **Where The Final Plan Divides Political Subdivisions, Without Justification, In Contravention Of The Explicit Constitutional Mandate That Prohibits Divisions “Unless Absolutely Necessary,” The Court Should Remand The Reapportionment Proceeding To The Commission To Eliminate All Unnecessary Divisions Of Political Subdivisions**

1. **The Clear And Controlling Constitutional Mandate That Divisions Are Prohibited “Unless Absolutely Necessary”**

Article II, section 16 of the Pennsylvania Constitution provides, in pertinent part, that “[u]nless absolutely necessary, no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.” In past reapportionment efforts, this provision has been subordinated to concerns regarding the requirement of substantial equality of population as nearly “as practicable.” However, this Court has repeatedly expressed its concern that population equality cannot be emphasized to the extent that other constitutional mandates, including the “unless absolutely necessary” provision, are ignored.

In this Court’s most recent consideration of legislative reapportionment, *Albert v. 2001 Legislative Reapportionment Commission*, 567 Pa. 670, 790 A.2d 989 (2002), Mr. Justice Saylor wrote a concurring opinion to the reapportionment plan’s approval, which now Mr. Chief Justice Castille and Mr. Justice Eakin joined. Justice Saylor contended that the Court “should not occupy an unduly passive role in the vindication” of the essential constitutional principles. 567 Pa. at 688, 790 A.2d at 1000. He specifically addressed the constitutional “absolutely necessary” mandate, observing:

[F]acets of the Commission’s present plan for reapportioning the Pennsylvania Legislature **test the outer limits of justifiable deference, at least in the absence of some specific explanation** for why the constitutional prerequisites of compactness and **respect for political subdivisions** cannot be accommodated simultaneous with the maintenance

of substantial equality of population and enforcement of voting interests of protected groups in the manner prescribed by federal law.

567 Pa. at 688, 790 A.2d at 1000 (emphasis supplied). These Justices thus recognized the need for the Court's scrutiny of a reapportionment plan to ensure compliance with the constitutional prerequisites and the need for the Commission to provide concrete justifications, not simply bald assertions of "necessity," where a reapportionment plan requires splits of a county or other political subdivision.

2. The Court's Concern Regarding The Need For The Commission To Justify Any Divisions

The concern regarding the absence of a rationale for divisions which the concurring Justices expressed in *Albert* was also apparent in the Court's consideration of past Pennsylvania reapportionment efforts. In *Com. ex rel. Specter v. Levin*, 448 Pa. 1, 293 A.2d 15 (1972), the Court identified the constitutional requirements of Article II, section 16, recognizing that, because of population differences, "a certain amount of subdivision fragmentation is inevitable." 448 Pa. at 17, 293 A.2d at 23. With a 4 to 3 decision, the Court held that the interest in equality of population could justify the division of some political subdivisions.

The tension between the equality of population provision and the "absolutely necessary" mandate was, however, the subject of strong dissents. Chief Justice Jones contended that the majority failed to give any weight to the phrase "unless absolutely necessary." Citing instances of divided precincts and wards in the plan, the Chief Justice disapproved of the majority's approval of it, stating:

The Commission utterly fails to demonstrate any necessity in any manner in justification of the many divisions of political entities embodied in the plan. The majority decision repudiates the constitutional mandate in this respect.

448 Pa. at 22, 293 A.2d at 25-26. The Chief Justice quoted the observation of the United States Supreme Court that a state may desire to maintain the integrity of political subdivisions “insofar as possible” but noted that, in the reapportionment scheme presented, the Commission had divided counties, municipalities and even precincts so that persons living on opposite sides of the street in the same precinct would vote in different legislative and senatorial districts. He concluded that the plan “ignores the dictates of the Pennsylvania Constitution in the formation of senatorial and legislative districts and amounts to constitutionally offensive political and partisan gerrymandering.” 448 Pa. at 23, 293 A.2d at 26, quoting *Reynolds v. Sims*, 377 U.S. at 560-61, 578. Writing separately, Justice Pomeroy similarly challenged the majority’s acceptance of the claimed “obvious necessity” of the plan’s divisions and observed:

This may be a good guess, but to me it is by no means obvious. In the face of constitutional language which prohibits divisions unless “absolutely necessary,” **there surely must be some showing of necessity, some demonstration that “the population principle cannot otherwise be satisfied.”**

448 Pa. at 27, 293 A.2d at 28 (emphasis supplied). He acknowledged that that some divisions might be unavoidable, but opined that although perfection is not possible, given the objectives of population equality, compactness and continuity, “this does not relieve [the Commission] of the **obligation to explain and justify** the inability to achieve these simultaneous objectives. *Id.* (emphasis supplied).

Again noting the inevitability that some of the state’s political subdivisions must be divided among legislative districts, the Court approved the 1981 reapportionment plan. *In re Reapportionment Plan for the Pennsylvania General Assembly*, 497 Pa. 525, 538, 442 A.2d 661, 668 (1981). Again, three justices dissented, questioning whether the majority had ignored the “unless absolutely necessary” mandate in favor of the “substantial equality of population”

provision. Given the availability of alternative plans which avoided a number of the divisions in the final plan, Mr. Justice Nix commented that the alternative plans were not necessarily dispositive but strongly suggested that they demonstrated that the accepted final plan could not comport with the constitutional mandate of absolute necessity. 497 Pa. at 541, 442 A.2d at 669. Justice Larsen opined that the plan was contrary to law and “nullified” the absolute necessity provision. He identified specific examples which he believed to be unnecessary splits, for which the Commission had offered no justification. 497 Pa. at 542, 442 A.2d at 670. Noting the sparseness of the record, Mr. Justice Kauffman also dissented, stating that the Commission had “not seen fit to explain or justify its plan in any way” or to specify why it had rejected the various exceptions to the plan. Unless the Commission is required to offer some explanation, the Commission would “be given a virtually unlimited license to read out of the Constitution” the absolute necessity provision. 497 Pa. at 549, 442 A.2d at 673. He concluded that the Court “should not sustain the Final Plan **without some evidence** supporting the conclusion that the Commission fully considered all of the constitutionally-mandated reapportionment standards . . .” 497 Pa. at 550, 442 A.2d at 674 (emphasis supplied).

Here, despite the clear mandate of the Constitution, the concerns this Court has expressed, and the advice of the Commission counsel to provide “concrete justifications” for any divisions, with the Final Plan, the Commission failed to set forth any justifications for the divisions embodied in the Final Plan.

3. Construction Of The “Absolutely Necessary” Requirement Under Pennsylvania Law

This Court has held that the construction concepts set forth in the Statutory Construction Act, 1 Pa. C.S. §§ 1901, *et seq.*, also apply to the interpretation of constitutional provisions. *See Perry County Telephone & Telegraph Co. v. Public Serv. Comm’n*, 265 Pa. 274,

278, 108 A. 659, 660 (1919) (“[T]he general principles governing the construction of statutes apply also to the interpretation of Constitutions.”); *Jubelirer v. Pa. Dep’t of State*, 859 A.2d 874, 876 (Pa. Commw. Ct. 2004), *aff’d*, 582 Pa. 364, 871 A.2d 789 (2005) (same). As Mr. Chief Justice Castille explained, in construing the Constitution, “our ultimate touchstone is the actual language of the Constitution itself . . . the language of the Constitution must be interpreted in its popular sense, as understood by the people when they voted on its adoption.” *Jubelirer v. Rendell*, 598 Pa. 16, 38, 953 A.2d 514, 528 (2008) (internal quotations omitted). *See also Walsh v. Tate*, 444 Pa. 229, 237, 282 A.2d 284, 288 (1971) (“[T]he words of a constitution, where plain, must be given their common or popular meaning, for it is in that sense the voters are assumed to have understood them when they adopted the constitution. . . Further, the presumption is that each and every clause in a written constitution has been inserted for some useful purpose and courts should avoid a construction which would render any portion of the constitution meaningless.” (internal citations omitted)); *Cavanaugh v. Davis*, 497 Pa. 351, 354, 440 A.2d 1380, 1382 (1982) (citing the Statutory Construction Act as guidance for constitutional interpretation).

In *In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election*, 577 Pa. 231, 843 A.2d 1223 (2004) (J. Castille), the Court considered the mandatory nature of the term “shall” in the context of a provision of the Election Code which stated that an absentee ballot “shall” be delivered “in person” to the board of electors. 25 P.S. § 3146.6(a). The Court reviewed the rules of statutory construction, directing its attention to the “plain language” of the statute. 577 Pa. at 243-44, 843 A.2d at 1230-31. “[W]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage. . . [W]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of

pursuing its spirit.” *Id.* (citing 1 Pa. C.S. §§ 1903, 1921). “It is only when the words of a statute ‘are not explicit’ that a court may resort to other considerations, such as the statute’s perceived ‘purpose,’ in order to ascertain legislative intent.” *Id.* The Court determined that it would only resort to the rules of construction when there is an ambiguity. *Id.* (quoting 1 Pa. C.S. § 1921) (additional citations omitted).

Addressing the meaning of “shall,” the Court held that the word “carries an imperative or mandatory meaning.” *Id.* (citing *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997) (“By definition, ‘shall’ is mandatory.”); *Black’s Law Dictionary* 1375 (6th ed. 1990) (“In common or ordinary parlance, and in its ordinary signification, the term ‘shall’ is a word of command, and one which has always or which must be given compulsory meaning; as denoting obligation. The word in ordinary usage means ‘must’ and is inconsistent with a concept of discretion.”)). Thus, the Court concluded, given the use of the term “shall,” under the statute’s plain meaning, the “in person” delivery requirement was mandatory. 577 Pa. at 234, 843 A.2d at 1225. *See also Chanceford Aviation Proprs., LLP v. Chanceford Township Bd. of Supervisors*, 592 Pa. 100, 107-08, 923 A.2d 1099, 1104 (2007) (Eakin, J.) (interpreting the Airport Zoning Act as mandating townships to enact zoning ordinances where the statute was free from ambiguity and the statute’s use of “shall” was mandatory). *Accord Holland v. Marcy*, 817 A.2d 1082 (Pa. Super. Ct. 2002) (Orie Melvin, J.), *aff’d*, 584 Pa. 195, 883 A.2d 449 (2005) (determining that the plain meaning of the Motor Vehicle Financial Responsibility Law did not prohibit a non-owner insured from maintaining an action for losses, although the owner chose limited tort recovery).

4. Application Of Interpretive Principles To Article II, Section 16 Of The Pennsylvania Constitution

Here, in establishing the prerequisites for reapportionment, the Pennsylvania Constitution provides, that districts “shall” be composed of compact and contiguous territory, “as nearly equal in population as practicable.”²⁶ It also mandates that a reapportionment plan “shall” contain no divisions of government units – from counties to wards – “unless absolutely necessary.” This provision thus carries the “imperative or mandatory meaning” of “shall” which the Commission cannot simply disregard. The Constitution’s mandatory requirement is reinforced by the emphatic language that no political subdivision shall be divided “unless absolutely necessary.”²⁷

5. Historical Importance Of Maintaining The Integrity Of Political Subdivisions

The phrase “unless absolutely necessary” reflects the historic importance of maintaining the integrity of political subdivisions in apportionment efforts and the appropriate balance with the equal protection requirements the United States Supreme Court imposed in

²⁶ “Practicable” is defined as “**1. Capable of being effected, done, or put into practice; feasible. 2. Usable for a specified purpose.**” See *Am. Heritage Dictionary of the English Language* 1377 (4th ed. 2006). It is thus, by definition, a qualified and not absolute term.

²⁷ This Court had indicated that the term “necessary,” used without the modifying term “absolutely,” does not mean “absolutely necessary” but rather conveys a “reasonable necessity” for the purpose intended. See *Barnes Foundation v. Keely*, 314 Pa. 112, 118, 171 A. 267, 269 (1934). By contrast, here, the Constitution uses the phrase “absolutely necessary.” The term “absolutely” is defined as “**1. Definitely and completely; unquestionably. 2a. In a manner that does not take an object. 2b. In an absolute relationship.**” See *Am. Heritage Dictionary of the English Language* 7 (4th ed. 2006). “Necessary” is defined as “**1. Absolutely essential. 2. Needed to achieve a certain result or effect; requisite. 3a. Unavoidably determined by prior conditions or circumstances; inevitable. 3b. Logically inevitable. 4. Required by obligation, compulsion, or convention.**” *Id.* at 1175 Thus, “absolutely necessary” is unambiguous in conveying an unqualified mandate. The use of the phrase “absolutely necessary” was given appropriate constitutional context by its inclusion in the Preamble to the 1776 Constitution which used the term in emphasizing that due to the “unabated vengeance” of the king of Great Britain, “it is **absolutely necessary** for the welfare and safety of the inhabitants of said colonies that they be henceforth free and independent States. . .” Pa. Const. Preamble (1776) (emphasis supplied).

1964 with *Reynolds v. Sims*. The first Pennsylvania Constitution, adopted on September 28, 1776, and signed by Benjamin Franklin, established a supreme executive council chosen from the City of Philadelphia and each county.²⁸ In establishing rules for redistricting, the 1790 Constitution of the Commonwealth of Pennsylvania provided that “[n]either the city of Philadelphia nor any county shall be divided in forming a district.” Pa. Const. art. I, § 7 (1790). Prior to the 1968 constitutional amendments, the Pennsylvania Constitution contained separate sections addressing the House and the Senate. As this Court noted in *Com. ex rel. Specter*, both the Senate and House districts were required to be of “compact and contiguous territory.” Only Senate Districts were subject to the provision requiring respect for political subdivisions which stated: “No ward, borough or township shall be divided in the formation of a district.” 448 Pa. at 18, 293 A.2d at 8 n. 16.

In *Com. ex rel. Specter*, this Court explained that the United States Supreme Court had recognized the need for state governments to create districts that did not divide political subdivisions, noting that:

“somewhat more flexibility may be constitutionally permissible with respect to state legislative apportionment than in congressional districting.” The Court there made it clear why states should have ‘somewhat’ greater flexibility to attempt to preserve the boundaries of political subdivisions in legislative apportionment: ‘Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature’s activity involves the enactment of so-called local legislation, directed only to the concerns of the particular political subdivisions.’”

448 Pa. at 12-13, 293 A.2d at 21 (quoting *Reynolds v. Sims*).

²⁸ The counties identified in the 1776 Constitution were Philadelphia, Chester, Bucks, Lancaster, York, Cumberland, Berks, Northampton, Bedford, Northumberland and Westmoreland. Pa. Const. art. I, § 19 (1776).

The 1968 amendments to the Pennsylvania Constitution were undertaken to effectuate the requirement of substantial equality in population, with an explicit recognition of the historic and ongoing importance of political subdivisions. The mandate for both the Senate and House, as reflected in Article II, section 16, is that political subdivisions, from counties to wards, should not be divided “unless absolutely necessary,” to achieve a “practicable” level of population equality.

Here, assuming that levels of equality can be achieved, along with compact and contiguous districts of population as nearly equal “as practicable,” under the Constitution, the Commission **must** avoid the splits of governmental units, if at all possible.²⁹

6. Other State Supreme Courts Have Required Adherence To Provisions Similar To Pennsylvania’s “Absolutely Necessary” Mandate

In applying similar requirements of “absolute necessity” of reapportionment divisions or preexisting boundaries or subdivisions, the Supreme Courts of other states have required the state’s reapportionment commission to provide justification for any divisions. Just two months ago, in *In re Reapportionment of the Colorado General Assembly*, No. 11-SA-282, 2011 WL 5830123, --- P.3d --- (Colo. Nov. 15, 2011), the Colorado Supreme Court considered the constitutional mandate that prohibits districts that divide counties “except when necessary to meet the equal population requirements.” The court found that the commission’s justification for county splits – grouping community interests – was inadequate where the record indicated that

²⁹ This Court has previously addressed appropriate levels of practicable population equality. In 1972, in *Com. ex rel. Specter v. Levin*, this Court approved a plan that had a total range of deviation from the ideal Senate district of 4.31%, and from the ideal House district of 5.46%. 448 Pa. at 15, 293 A.2d at 22. In 2001, the total range of deviation from the ideal Senate district was 3.98% and from the ideal House district, 5.54%. *Albert*, 567 Pa. at 680, 790 A.2d at 995. Thus, based on the decisions of this Court interpreting Article II, Section 16, it is clear that a population deviation of 4.31% in the Senate or less, and a population of 5.54% in the House or less satisfies the equal protection requirement of *Reynolds v. Sims* and Article II, Section 16.

alternative plans were available that avoided the splits while still preserving community interests. *Id.* In directing a remand, the court held that the commission had not made an adequate showing that “a less drastic alternative could not have satisfied the hierarchy of constitutional criteria set,” thus placing the onus on the commission to show that another plan would not have satisfied constitutional requirements. *Id.* The court remanded the plan to the commission with the direction that it formulate a plan that complies with the constitutional mandate.

In *Fischer v. State Bd. of Elections*, 879 S.W.2d 475 (Ky. 1994), the Supreme Court of Kentucky found that “the competing concepts of population equality and county integrity” were of at least equal importance where the Kentucky Constitution required districts to be divided “as nearly equal in population as may be without dividing any county.” *Id.* at 477. The court recognized that a presumption of validity emerged so that, if “the maximum population deviation does not exceed -5% to +5% and provided that any such deviation is in furtherance of state policy,” no constitutional violation based on “one-person, one-vote” would be found. *Id.* at 478 (citing *Connor v. Finch*, 431 U.S. 407 (1977) and *Gaffney v. Cummings*, 412 U.S. 735 (1973)). Rejecting the plan presented, the court held that, using these parameters, it was possible for the legislature to formulate a plan which reduced the divided districts while still complying with the equal population requirement. *Id.* at 479. Recognizing the disruptions that a change in the reapportionment plan would cause for the upcoming election, however, the court postponed the finality of its order until after the election. The court thus mandated compliance with the Kentucky Constitution’s reapportionment requirements for future elections but directed a pragmatic solution to avoid havoc in the current election cycle.³⁰

³⁰ See also *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003) (North Carolina Supreme Court held that the state constitution’s whole-county requirement must be enforced to the maximum extent possible and found that plans that did not strictly adhere to that requirement were unconstitutional); *In the Matter of*

The Supreme Courts of these states addressed the same constitutional tensions and practical concerns now before this Court and, with deference to the significant legislative undertaking of reapportionment, acted to ensure compliance with constitutional directives.

B. The Commission Offered No Concrete Constitutional Justification For The Deficiencies Of The Final Plan

1. The Final Plan Contained Numerous Divisions That Are Demonstrably Unnecessary

The Final Plan includes 11 excess divisions of counties; two excess divisions of municipalities; and redistributes Senate District No. 15 so that this once compact district is now in parts of four counties and excludes the City of Harrisburg, the county seat of Dauphin County. By moving Senate District No. 45, the Final Plan also disperses the communities of the Mon Valley into various Senate Districts and displaces an incumbent Senator. The Alternative Plan, like the Final Plan, achieves “practicable” equality of population. As the statistical analysis of the Final Plan demonstrates, the Alternative Plan achieves this goal without the 11 unnecessary divisions of counties and two unnecessary divisions of municipalities. (App. H, Exs. 10, 11 and 12). The Commission failed to provide any concrete justifications for any of these demonstrably unnecessary divisions as contained in the Final Plan.

By contrast, as Commissioner Costa demonstrated with the Alternative Plan and substantial evidence, a significant number of the Final Plan’s failures to adhere to political subdivision boundaries are not “absolutely necessary” as the Constitution requires. (App. H, Exs. 10, 11 and 12). The Alternative Plan does not divide Adams, Somerset or Washington Counties, each of which the Final Plan splits among three districts. The Alternative Plan does

Legislative Districting of the State, 805 A.2d 292 (Md. 2002) (court overturned redistricting plan as unconstitutional because it included district lines that unnecessarily crossed natural or political subdivision boundaries and retained its own technical consultant to devise a constitutional plan).

not divide Carbon, Clinton, Franklin, Lawrence, Perry or Snyder Counties, each of which the Final Plan splits among two districts.

Eliminating these divisions is not simply a numerical exercise. Although they point to specific examples of the Final Plan's constitutional deficiencies, the Petitioners here do not simply complain of isolated incidences of division but rather to the Final Plan's inherent failures to comply with the "unless absolutely necessary" mandate. Each of the identified 11 unnecessary county divisions and two municipality divisions reflects a significant impact on the representation of the affected political subdivisions and of the Commonwealth as whole. It is for this reason that Pennsylvania has, historically and constitutionally, required respect for county and municipal boundaries and it is for this reason that the Petitioners ask this Court to reject the Final Plan as unconstitutional.

2. This Court Should Require Some Specific Explanation For Why The Constitutional Prerequisite Of Respect For Political Subdivisions Cannot Be Accommodated

Consistent with Pennsylvania's earliest constitutional provisions, Article II, section 16 of the Pennsylvania Constitution mandates respect for the boundaries of political subdivisions. Under the rules of construction, this provision's directive that political subdivisions "shall not" be divided "unless absolutely necessary" must be given its compulsory meaning. At the very least, the Commission should be required to offer some demonstration of "necessity," particularly where an Alternative Plan exists and identifies unnecessary splits of political subdivisions. The Commission should have justified the divisions in the Final Plan – or, without justification, should have eliminated unnecessary divisions – instead of simply expecting the Court to accept its bald assertion that respect for political subdivision boundaries could not be accommodated. Unlike in past reapportionment challenges, the statewide statistical data that Senator Costa presented provides conclusive evidence that it was not "absolutely necessary" for

the Commission to divide multiple subdivisions. That data is reflected in the Alternative Plan, which, in all relevant respects, is similar to the Final Plan except for its reduction in the number of divisions of political subdivisions.

In reviewing Pennsylvania's most recent reapportionment effort in 2001, three of the Justices of this Court recognized the need for the Court's scrutiny of the Commission's undertaking to ensure compliance with all of the Constitution's requirements. In concurring with the Court's approval of that plan, the Justices deferred to the Commission's representations regarding compactness and respect for political subdivision but questioned the absence of any specific justification for the divisions included in the plan. *Albert*, 567 Pa. at 688, 790 A.2d at 1000. As Mr. Justice Saylor wrote, in the absence of some specific explanation for why political subdivisions cannot be accommodated, judicial deference should not be provided where the Commission fails to provide any concrete justification for the unnecessary divisions in defiance of a clear mandate of the Constitution. In articulating this view, the concurring Justices in *Albert* echoed the concerns of other Pennsylvania jurists since the adoption of Article II, section 16.

Without some justification, particularly in view of the clear evidence that at least 11 of the divisions in the Final Plan at issue here are unnecessary, the Commission should be required to offer some explanation or, as Mr. Justice Kauffman warned, the Commission could be given "a virtually unlimited license to read out of the Constitution" the "unless absolutely necessary" provisions. *In re Reapportionment Plan for the General Assembly*, 497 Pa. at 549, 442 A.2d at 673. This Court was not able to ignore a mandatory directive in the Election Code in *In re Canvas of Absentee Ballots* and, consistent with that decision, should enforce the clear "shall" directives of the Constitution here.

3. A Remand To The Commission For Elimination Of The Deficiencies Of The Final Plan Would Be Appropriate

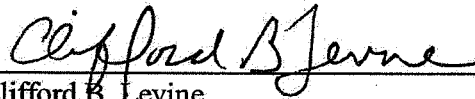
The evidence to the Commission in this reapportionment proceeding demonstrates that the divisions included in the Final Plan are not necessary. This challenge, therefore, does not simply test the limits of reasonable judicial deference but, pursuant to the imperative meaning of the “unless absolutely necessary” phrase in Article II, section 16, demands a judicial directive to the Commission to comply with the Constitution. The courts of other states have fashioned reasonable remedies to address similar deficiencies in reapportionments.

Using the Alternative Plan as a starting point and recognizing the almost effortless ability, with contemporary technology, to generate maps, the Commission would be capable of complying with the constitutional directives within days. The citizens of political subdivisions throughout the Commonwealth would be the beneficiaries of constitutional adjustments to the Final Plan. The elimination of unnecessary divisions of counties and municipalities would improve the effectiveness of state government. The failure to take any action, given the clear evidence of unnecessary divisions of political subdivisions, would raise the troubling prospect that future Commissions would be emboldened to disregard the Pennsylvania Constitution which mandates that no political subdivision should be divided “unless absolutely necessary.”

VIII. CONCLUSION

For the foregoing reasons, the Petitioners ask this Court to remand the Reapportionment Plan to the Commission with direction to eliminate unnecessary divisions of political subdivisions.

Respectfully submitted,



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