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SUPREME COURT
WESTERN DISTRICT

Petitioners' Brief in Support of Petition for Review, in the Nature of An
Appeal from the 2012 Final Plan of the
Legislative Reapportionment Commission, dated June 8, 2012

Respondent.
2011 LEGISLATIVE REAPPORTIONMENT COMMISSION,

v.

Petitioners,
**KATHRYN VARGO, JENNIFER GRAB,
SANDRA WOLFE, ANTONIO LODICO, EMILY CLEATH,
DANIEL McARDLE BOOKER, RACHEL CANNING and
PATRICK CLARK,**

126 MM 2012, 127 MM 2012, 128 MM 2012,
129 MM 2012, 130 MM 2012, 131 MM 2012, 132 MM 2012,
133 MM 2012, 134 MM 2012, 39 WM 2012, 40 WM 2012, 41 WM 2012

Consolidated with:

No. 42 WM 2012

IN THE SUPREME COURT OF PENNSYLVANIA

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I. STATEMENT OF JURISDICTION

This Honorable Court has exclusive appellate jurisdiction over the Petition for Review in this matter (the "Petition") pursuant to Article II, Section 17(d) of the Constitution of Pennsylvania and the Act of July 9, 1976, P.L. 586, No. 142, effective June 27, 1978, as amended, 42 Pa.C.S. § 725(1). The Petition is addressed to the Court's appellate jurisdiction and is in the nature of a Petition for Review pursuant to Rule 3321 and Rule 1501 *et seq.* of the Pennsylvania Rules of Appellate Procedure.

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

This Honorable Court's scope of review extends to the 2012 Final Plan of the 2011

Legislative Reapportionment Commission, adopted on June 8, 2012, and entails consideration of all relevant evidence, and legal authority, that a Final Plan is contrary to law. *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 733 (Pa. 2011). This includes, but is not limited to, the comparison of the Final Plan with any alternative plans submitted which may, for illustrative purposes, assist the Court in its determination.

Under the Constitution of Pennsylvania, Article II, Section 17(d), this Honorable Court reviews the 2012 Final Plan to determine whether it is "contrary to law." This Court's standard of review undertakes a "plenary and non-deferential review in adjudicating constitutional challenges." *Pa. Turnpike Comm'n v. Commonwealth*, 899 A.2d 1085, 1094 (2006); see also, *Holt*, 38 A.3d at 734.

III. CONTROLLING CONSTITUTIONAL PROVISION

Section 16 of Article 2 of the Pennsylvania Constitution ("Section 16") states in relevant part:

Commission did not provide any explanation why the divisions of counties, municipalities and

3. Whether the Commission's 2012 Final Plan is contrary to law, in that the

(Implicitly answered in the negative by the Commission)

federal requirements, and therefore is in violation of Section 16 of Article 2 of the Constitution.

population equality, compactness and contiguousness provisions of the Constitution, and/or

counties, municipalities and/or wards that are not absolutely necessary to comply with

Representatives, as a whole, is contrary to law because it contains excessive divisions of

2. Whether the Commission's 2012 Final Plan for the Pennsylvania House of

(Implicitly answered in the negative by the Commission)

in violation of Section 16 of Article 2 of the Constitution.

and contiguousness provisions of the Constitution, and/or federal requirements, and therefore is

and/or wards that are not absolutely necessary to comply with population equality, compactness

whole, is contrary to law because it contains excessive divisions of counties, municipalities

1. Whether the Commission's 2012 Final Plan for the Pennsylvania Senate, as a

V. STATEMENT OF QUESTIONS INVOLVED

Legislative Reapportionment Commission.

Reapportionment Commission, as adopted on June 8, 2012, at a public meeting of the 2011

The determination in question is the 2012 Final Plan of the 2011 Legislative

IV. DETERMINATION IN QUESTION

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.... 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

wards was absolutely necessary in light of evidence before the Commission that they were not all

required in order to obtain compliance with other constitutional or statutory mandates.

(Implicitly answered in the negative by the Commission)

VI. STATEMENT OF THE CASE

A. Form of Action and Procedural History

This is a Petition for Review of the 2012 Final Plan ("Final Plan") of the 2011 Legislative

Reapportionment Commission ("Commission"), established pursuant to **Section 17(b) of Article**

II of the Pennsylvania Constitution.

The 2011 Legislative Reapportionment Plan was found to be contrary to law by this

Court, and remanded to the Commission on January 25, 2012. On remand, the Commission held

public meetings on February 22, 2012 and April 12, 2012. On April 12, 2012, the Commission

adopted a Preliminary Revised Plan. The Commission conducted public hearings to discuss the

adoption of a Revised Final Plan at public hearings on May 2, 2012 and May 7, 2012. The

Commission adopted the Revised Plan ("Final Plan") at a public administrative meeting held on

June 8, 2012. The Commission did not address several filed exceptions in its public hearings,

meetings, or Final Plan.

B. Prior Determination to Be Reviewed

The prior governmental determination in this case is the 2012 Final Plan adopted by the

Commission on June 8, 2012, and filed on that date with the Secretary of the Commonwealth of

Pennsylvania. Relevant portions of the Final Plan and Map were attached to the Petition as

Exhibits.

C. Factual Chronology

Following this Honorable Court's remand to the Commission on January 25, 2012, the

Commission held public meetings on February 22, 2012 and April 12, 2012. On April 12, 2012, the Commission adopted a Preliminary Revised Plan. The Commission conducted public

hearings to discuss the adoption of a Revised Final Plan at public hearings on May 2, 2012 and May 7, 2012. The Commission adopted the Revised Plan ("Final Plan") at a public

administrative meeting held on June 8, 2012. In some ways, the Commission's Final Plan was radically different from the Preliminary Revised Plan. Yet, despite drastic changes in portions of the map, the Commission did not address several exceptions raised in its public hearings or meetings, as the number of split political subdivisions is still in excess of many alternative and illustrative plans presented to it.

Petitioners filed a Petition for Review in this matter on July 9, 2012, challenging the plan as a whole, and are voters in the Commonwealth of Pennsylvania who live in the Commonwealth's counties, municipalities and wards which are split, often multiple times, to form Senatorial and/or House of Representative districts contrary to the constitutional mandate that no such division shall be made "unless absolutely necessary." They are:

Kathryn Vargo of West Leechburg Borough, Westmoreland County, Jennifer

Grab of the 19th Ward of the City of Pittsburgh, Allegheny County, Sandra Wolfe of

Mechanicsburg Borough, Cumberland County, Antonio Lodico of the 15th Ward of the

City of Pittsburgh, Allegheny County, Emily Cleath of the 9th Ward of the City of

Pittsburgh, Allegheny County, Daniel McArdle Booker of the 14th Ward of the City of

Pittsburgh, Allegheny County, Rachel Canning of the 26th Ward of the City of Pittsburgh,

flexibility in standards for population equality would provide a greater latitude in meeting other

Commission, 38 A.3d 716, 760 (Pa. 2012) The Court went on to indicate that a greater

being at war, or in tension, with the fourth.” *Holt v. 2011 Legislative Reapportionment*

recognize the difficulty in balancing, we do not view the first three constitutional requirements as

command to create legislative districts as nearly equal in population as practicable. Although we

embrace contiguity, compactness, and the integrity of political subdivisions, no less than the

opportunity to reaffirm the importance of the multiple commands in Article II, Section 16, which

guidance to the Commission on remand. Specifically, the Court said that “...we take this

In striking down the Commission’s previous plan, this Honorable Court provided

which subvert those contained in the Constitution.

to redefine the meaning of common words in the English language in order to accomplish goals

598 Pa. 16, 39 (Pa. 2008). The plain meaning of this prohibition does not invite the Commission

and should be enforced in accordance with its plain and ordinary meaning. *Jubelirer v. Rendell*,

The prohibition on splitting subdivisions “unless absolutely necessary” is unambiguous,

senatorial or representative district.” **Pa. Const. Art. II, sect. 16** (emphasis supplied).

county, city, incorporated town, borough, township or ward shall be divided in forming either a

The Pennsylvania Constitution provides that, “Unless absolutely necessary no

VII. SUMMARY OF ARGUMENT

Reapportionment Commission on June 8, 2012.

The determination under review is the adoption of the 2012 Final Plan by the Legislative

D. Determination Under Review

County.

Allegheny County, and Patrick Clark of the 8th Ward of the City of Pittsburgh, Allegheny

legitimate Constitutional requirements, and said, "Like the U.S. Supreme Court, we do not direct a specific range for the deviation from population equality, or purport to pre-approve redistricting plans that fall within that range. Nor do we direct the LRC to develop a reapportionment plan that tests the outer limits of acceptable deviations. *Holt*, 38 A.3d at 761. The Commission, given increased flexibility on the aim of population equality, nonetheless adopted a map which excessively splits political subdivisions in both the Senate and House plans. The plan as a whole, therefore, is "contrary to law," and should be overturned.

The Commission's 2012 Final Plan must be overturned because it is contrary to law. The Pennsylvania Constitution provides that, "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, sect. 16** (emphasis supplied).

The prohibition on splitting subdivisions "unless absolutely necessary" is unambiguous, and should be enforced in accordance with its plain and ordinary meaning. *Jubelirer v. Rendell*, 598 Pa. 16, 39 (Pa. 2008). The plain meaning of this prohibition does not invite the Commission to redefine the meaning of common words in the English language in order to accomplish goals which subvert those contained in the Constitution.

The Pennsylvania Constitution divides the Commonwealth into 50 Senatorial Districts and 203 Representative Districts. Based upon the 2010 census, the population of Pennsylvania is 12,702,379. The ideal population of each Senatorial District, therefore, would be 254,048; the ideal population of each House District would be 62,573.

VIII. ARGUMENT

In striking down the Commission's previous plan, this Honorable Court provided guidance to the Commission on remand. Specifically, the Court said that "...we take this opportunity to reaffirm the importance of the multiple commands in **Article II, Section 16**, which embrace contiguity, compactness, and the integrity of political subdivisions, no less than the command to create legislative districts as nearly equal in population as practicable. Although we recognize the difficulty in balancing, we do not view the first three constitutional requirements as being at war, or in tension, with the fourth." *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 760 (Pa. 2012)

The Court went on to indicate that a greater flexibility in standards for population equality would provide a greater latitude in meeting other legitimate Constitutional requirements, and said, "Like the U.S. Supreme Court, we do not direct a specific range for the deviation from population equality, or purport to pre-approve redistricting plans that fall within that range. Nor do we direct the LRC to develop a reapportionment plan that tests the outer limits of acceptable deviations. *Holt*, 38 A.3d at 761.

On remand, the Commission adopted a Plan which increased the population deviation while continuing to divide an unnecessary number of political subdivisions. Specifically, the Senate Plan splits 25 counties, 2 municipalities and 10 wards, while the House Plan splits 50 counties, 68 municipalities and 103 wards. The Commission does not contest the contention that it is possible to formulate a plan which splits substantially less political subdivisions while also adhering to the mandates of equal population and other relevant Constitutional mandates.

Therefore, for those reasons, and the reasons discussed below, the Commission's 2012 Final Plan is contrary to law and must be overturned.

A. Senate Plan

i. Excessive Subdivision Splits

The Senate map adopted by the Commission has a maximum deviation from ideal

population of 7.957%, and contains 37¹ split subdivisions and 71 total subdivision splits. In contrast, the "Revised Holt Plan"² for the Senate, by comparison, has a maximum deviation from ideal population of 7.866%, and contains 17 split subdivisions and 35 total subdivision splits. Likewise, the plan submitted by Senator Costa contained 10 less county splits than the number of county splits in the 2012 Final Plan.

There are numerous examples of subdivisions which were split in the 2012 Final Plan for the Senate which are unnecessary, creating multiple fractures of political subdivisions that should not be split at all. For example:

1. The 2012 Final Plan splits a *precinct* (Ward 40, Division 30), between the First

Senatorial District and the Eighth Senatorial District which is unnecessary for any Constitutional reason; further, there is no articulable reason for splitting a precinct in a Senate plan.

2. The 2012 Final Plan splits Cumberland County, which is 92.66% of an ideal

Senate District population into *three* Senate Districts. One of the districts extends from central

Cumberland County west to include Blair County, to form a district which is neither compact nor rational. There are no equal protection, Voting Rights Act ("VRA")³ or other requirements

which justify even a single split, much less three.

3. The 2012 Final Plan splits Butler County into *three* Senate Districts even though

it is only a -27.63% deviation from the ideal Senate District population. One of the districts

extends from the New York state border in Warren County into the far southwest corner of

¹ 25 counties, 2 municipalities and 10 wards are split in the Commission Plan.
² As attached to the Holt, et.al., Petition for Review.
³ 42 U.S.C. §1973

Butler County, Cranberry Township, to form a district which is neither compact nor rational. There are no equal protection, VRA or other requirements which justify even a single split, much less three.

4. The Final Plan splits Ward 12 of Philadelphia into *two* Senate Districts even though it is only 8.65% of an ideal Senate district population, and Ward 21 into two Senate Districts even though it is only 17.44% of an ideal Senate district population.

5. The Final Plan splits Huntingdon County into *two* Senate Districts even though it is only 18.07% of an ideal Senate district population, and Washington County into two Senate districts even though it is only a -18.20% deviation from the ideal Senate district population. No split is justified in any of these counties.

The Vargo Petitioners cite the above examples to show that the 2012 Final Plan contains an inordinate number of county and ward splits which are unnecessary and excessive, as shown illustratively by the alternative submissions of various parties to the Commission, and specifically the Costa Plan and Holt Senate Alternative Senate Plan – Alternate B.

ii. Senate District 38

While Petitioners believe that the excessive split political subdivisions is a sufficient reason to declare the Senate Plan to be contrary to law, specific discussion of the 38th Senatorial District is warranted due to the egregious nature of the Commission's action which affected this district.

The 2012 Final Plan unnecessarily splits the 1st and 12th Wards of the City of Pittsburgh away from the remainder of the City, and places them in a district encompassing the northern suburbs of Allegheny County. This is an unnecessary split of the City of Pittsburgh.

In addition, in that the 11th and 12th Wards are predominantly African-American, this

action of the Commission deprives the African-American community of the City of Pittsburgh from having significant voting strength in *any* Senate District covering a portion of the City, placing these minority communities, like an afterthought and an appendage, into a district in which they do not share any commonality, or community of interest⁴, other than being in the same county.

The prior (2001) configuration of the 38th District gave African-American voters a

significant influence in the district, having approximately 30% of the population, even though the District extended into overwhelmingly white areas of Westmoreland and Armstrong

Counties. Yet, while eliminating these areas, the Commission has created a district which dilutes the voting influence of the majority African-American population of the 11th and 12th Wards of

the City of Pittsburgh into a district which will only be 6% African-American.

Further, the voting strength of African-Americans in the remaining Senate districts in the

City of Pittsburgh does not become significantly influential as a result. For example, while the

African-American population of the 38th Senatorial District is being reduced from 29.1% to

6.2%, the African-American population of District 42 is increased from 12.8% to 20.4%, and the

African-American population of District 43 increases from 15.8% to 23.2%. In other words, the

African-American population is being split between these districts in such a manner as to dilute

voting influence of African-Americans from that which they previously had in the 38th Senatorial

District. See Appendix A

This is particularly egregious as no prior iteration of a reapportionment plan for the

Senate accomplished this result. Specifically, the 2012 Preliminary Plan did not move the

⁴ See discussion of communities of interest later in this brief.

African-American majority 11th and 12th Wards to a district which was overwhelmingly white

and overwhelmingly suburban.

Most importantly, none of the affected communities were given an opportunity to

comment on this drastic change prior to the Commission's June 8, 2012 vote. This extreme and sweeping change, with many implications to minority communities, was merely introduced as an amendment at the Commission meeting and adopted within minutes, without the opportunity for any public comment.

For all of the reasons above, the Senate Plan is contrary to law.

B. House Plan

The House map has a maximum deviation from ideal population of 7.872%, and contains 221 split subdivisions⁵ and 458 total subdivision splits. By contrast, the "Revised Holt Plan"⁶ for the House has a maximum deviation from ideal population of 7.751%, and contains 86 split subdivisions and 258 total subdivision splits.

In other words, even using a greater deviation from ideal population, which should result in the need to split *less* political subdivisions, the Commission version continues to produce a far greater number of county, municipal and ward splits than are "absolutely necessary."

There are many individual examples of unnecessary subdivision splits in the 2012 Final Plan which confirm that the Commission has once again failed to follow the clear dictates of the Constitution, and of this Court. For example, the 2012 Final Plan for the House split numerous subdivisions whose populations were smaller than the ideal House district population and therefore should not have been split at all, because no Constitutionally valid countervailing

⁵ The Commission plan splits 50 counties, 68 municipalities and 103 wards. ⁶ As attached to the Holt, et.al., Petition for Review.

considerations necessitated a split. Among a plan replete with *many* examples, we provide the

following few for illustrative purposes:

1. The 2012 Final Plan split Lower Merion, Montgomery County, into *four* House Districts, even though it is only a -7.59% deviation from an ideal House district population. The Commission even split two *wards* within Lower Merion. When combined with the Borough of Narberth, which is an enclave⁷ within Lower Merion, the population contained within these borders is 62,107, only a -0.007% deviation from an ideal House district population—in other words, the *perfect* size of a House district. There are no equal population, VRA or other requirements justifying even a single split, much less four. Given that Lower Merion-Narberth is the exact size of a House district, yet is divided into four districts, this is perhaps the most egregious example of excessive and unnecessary splits in the entire plan.

2. The 2012 Final Plan split O'Hara, Allegheny County, into *three* House Districts, even though it is only 13.4% of an ideal House district population. The Commission even split a *ward* within O'Hara. There is no justification for even a single split, much less three.

3. The 2012 Final Plan split Pittsburgh Ward 19 into *three* House Districts, even though it is only 43.47% of an ideal House district population. Not only did the Commission split the ward into three, distinct neighborhoods within the ward (i.e., Mount Washington and Brookline) were inexplorably divided as well, dividing obvious communities of interest. There are no equal population, VRA or other requirements that justified even a single split of the 19th Ward, much less three.

⁷ A term in political geography for a municipality completely contained within the borders of another.

4. The 2012 Final Plan split Swatara, Dauphin County, into *three* House Districts even though it is only 37.34% of an ideal House district population. There are no equal population, VRA or other requirements justifying even a single split, much less three.

5. The 2012 Final Plan split Upper Dublin, Montgomery County, into *three* House Districts even though it is only 40.86% of an ideal House district population. The Commission also split two wards within Upper Dublin unnecessarily. There are no equal population, VRA or other requirements justifying even a single split, much less three.

6. The 2012 Final Plan split Ridley, Delaware County, into *three* House Districts even though it is only 49.17% of an ideal House district population. There are no equal protection, VRA or other requirements justifying even a single split, much less three.

7. The 2012 Final Plan split Middletown, Bucks County, into *three* House Districts, even though it is only 72.61% of an ideal House district population. There are no equal protection, VRA or other requirements justifying even a single split, much less three.

8. The 2012 Final Plan splits 17 of Pittsburgh's 32 Wards, some of them multiple times; as shown by the various plans submitted by Amanda Holt, this excessive number of splits is unnecessary. Petitioners herein have also submitted a plan, (attached hereto as Appendix B) for illustrative purposes only, which is based on, and amends the Allegheny County portion of Holt House Version 2, and which reduces the number of ward splits and municipal splits in Allegheny County even further, as further indication that the number of splits proposed by the Commission is excessive and unnecessary.

The Vargo Petitioners cite the above examples to show that the 2012 Final Plan contains an inordinate number of county, municipal and ward splits which are unnecessary and excessive, as shown by the alternative submissions of various parties to the Commission, and specifically

the Commission's 2012 Final Plan are not "absolutely necessary." This Court provided the Commission with clear guidance on the factors which would be taken into account by the Court in evaluating a reapportionment plan. While saying that the Holt decision "does not purport to convey in absolute terms what is an acceptable number of political subdivision splits," the Court noted that the Holt alternative plan demonstrated that "a

alternative statewide plans which show, without question, that the number of splits contained in Once again, this Court is faced with a situation where various appellants have provided explanation from the Commission, the Court found that the plan was contrary to law. Constitutional mandates to a much greater degree than the Commission Plan, and absent any subdivisions[.]" *Id.* Faced with this evidence that a plan which followed the various the mandates in Article II, Section 16—compactness, contiguity, and integrity of political shown that the [Commission] could have easily achieved substantially greater fidelity to all of alternative statewide plans with significantly less splits of subdivisions, "the appellants have to respect the integrity of political subdivisions." The Court further noted that, by presenting this Honorable Court held that "the [Original LRC] Plan violate[d] the constitutional command In *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 716, 718 (Pa. 2012),

C. Discussion

any Constitutional purpose. For these reasons, the Commission's House plan is contrary to law. were unnecessary), and 103 ward splits (122 total ward splits), none of which were necessary for were unnecessary), 61 more municipalities than necessary (for 82 total municipal splits which the Commission split nine (9) more counties than necessary (for 54 total county splits which which should have allowed the Commission to minimize splits to those "absolutely necessary," the plans submitted by Amanda Holt. Even though the House plan uses a deviation of 7.87%,

redistricting map could readily be fashioned which maintained roughly equivalent level of

population deviation...as the [Commission's] Plan, while employing significantly fewer political subdivision splits with respect to both Chambers of the General Assembly." *Holt*, 38 A.3d at 754

Petitioners argue that, on remand, the Commission has continued to ignore the

Constitutional prohibition against excessive splits, and the holdings of this Court by adopting yet another map which contains needless and excessive splits of counties, cities, boroughs,

townships and wards. These splits are not "absolutely necessary," and many are not even

arguably or marginally necessary, to achieve any Constitutionally valid objective, because the

same level of population equality, compactness and contiguity can be achieved while

substantially reducing the number of places split, and the number of total splits, in both the

Senate and House plans.

i. The political subdivision splits in the Commission's Plan are not "absolutely necessary"

In the *Holt* opinion, this Court found that "The Holt alternative plan avoided a significant

percentage of political subdivision splits and fractures while maintaining a lower average

population deviation from the ideal than the [Commission's] Final Plan. A concrete showing has

been made that political subdivisions were split, even where the population was smaller than the

ideal legislative district and a division was avoidable; and that the number of fractures across the

Commonwealth was considerably higher in the Final plan than the Holt plan was easily

achievable. This powerful evidence, challenging the Final Plan as a whole, suffices to show that

the Final Plan is contrary to law." *Holt* 38 A.3d at 756

Again, alternative plans have been submitted, by Ms. Holt and others, which show that a

significant number of fractures contained in the 2012 Final Plan are avoidable. Faced with this

evidence, this Court should once again find the latest iteration of the Commission's Plan to be

contrary to law, unless the Commission can explain why the excessive fractures in its Plan are

“absolutely necessary.”

The Commission, however, has consistently taken the position that it need not explain

why it adopted the Plan which it did, nor explain why it believes that particular political

subdivision splits, or the numerosity of splits in the plan as a whole, are “absolutely necessary.”

Indeed, throughout its Omnibus Answer to the various Petitions for Review, the Commission

took the position that “...this Court specifically held in *Holt* that the Commission has no burden

to explain or justify any element of its Final Plan.”⁸

This is apparently a reference to the language in *Holt* that which states: “the plain

language of the Constitution requiring appellants to establish that the Final Plan is contrary to

law does not leave the door open for a shift of the burden of production or persuasion to the

LRC. Moreover, the assignment of the burden of proof to the appellants is consistent with the

rest of the Section 17 process, including the provision that the Final Plan shall have the force of

law if no appeal is taken.” PA CONST. art II §17(e).” *Holt*, 38 A.3d at 737

Thereby, the Court made it clear that appellants would bear the burden of proving that a

Commission’s Final Plan was contrary to law, and that the burden would not shift to the

Commission upon a particular showing by the appellants.

However, stating which party has the burden of production and persuasion in a particular

matter is not the same thing as saying that the other party should fail to provide an explanation

for their challenged action. In fact, this Court seemed to invite the Commission to explain their

actions, and went on to say, “The LRC may, of course, respond to the challengers’ allegations in

the briefing process, offering explanations for its various decisions.... In addition, the LRC may

⁸ e.g., Answer to Vargo, et.al., Petition for Review, at paragraph 38.

want to consider a process in its development of a Final Plan where it provides explanations, or responds to objections....” *Holt*, 38 A.3d at 737

Later in the opinion, at footnote 34, the Court seemed to reiterate this point, saying, “The LRC has had a full opportunity to offer neutral explanations of what were proven to be vast numbers of unnecessary splits of political subdivisions and failed to do so. We see no need for a remand for a specific explanation....” *Holt*, 38 A.3d at 754 fn.34.

Justice Eakin, in his concurring and dissenting opinion, noted that “An inherent problem in reviewing challenges to the ultimate plan is that no mechanism exists for the LRC to justify or explain its considerations or decisions. For better or worse, there are no means for it to explain individual lines or boundaries.” He went on to say, “Since there is no record, we cannot tell why the LRC did what it did. This is a problem for both those who would challenge the plan and for those of us who must evaluate those challenges.”

However, while the Commission may be under no obligation to do so, and while there may be no “mechanism” for the Commission to justify or explain itself, the Commission certainly has the ability to offer explanations if they choose to. Faced with alternative plans which once again show that a very significant number of splits of political subdivision could have been avoided while adhering to the other mandates of the Constitution, the Commission no doubt would have provided explanations for these splits which may serve to save their plan; however, to date, they have provided absolutely no explanations, and have, in fact, steadfastly invoked their right not to do so.

If explanations for splits in excess of those minimally required exist, they are not difficult to articulate. For example, in her alternative plans, Ms. Holt explains the reason for every split of every political subdivision, i.e., population, contiguity, or the Voting Rights Act, beyond those

In his public statement at the June 8, 2012 meeting of the Commission, Commissioner Turzai gave some indications of the methodology used by the Commission. Turzai said that “The first job that each and every one of us had on the Commission was to take into account the Census data that occurs every 10 years. What we do in looking at the maps and reconfiguring seats is to take into account what have been the population shifts within the Commonwealth of

APPORTIONMENT OF SEATS

Commission has no obligation to provide. Filings to attempt to piece together and glean answers that, as this Court has acknowledged, the We may only rely upon the public statements of Commission members, and the court Commission members or requests of incumbent officeholders?

Constitutional mandate? By base political considerations? By the personal desires of and the motivations of the Commission. Was the Commission motivated by some countervailing record, the public, and this Court, are in a position to surmise or guess at both the methodology Without the willingness of the Commission to explain its actions, or build a complete

ii. The Words of the Commission—Possible Explanations Offered

Commission adopted a Plan with substantially excessive splits of political subdivisions. searched for possible explanations in the record which may explain how and why the fractures could be avoided should be enough to invalidate the 2012 Final Plan, we also have *Holt* decision, the showing that a highly significant percentage of political subdivision splits and While the Vargo Petitioners take the position that, consistent with this Court’s earlier something other than that which would find support in the various mandates of the Constitution. splits of political subdivisions in their Final Plan—unless, of course, the reason for the splits was minimally required. Certainly nothing prevents the Commission from similarly explaining the

Pennsylvania such that they're a fair representation for each and every area. Once again, I'd like

to reiterate, if you divide the State into six regions, which would be appropriate – the southeast,

the northeast, the south central, the north central, the northwest and the southwest – these are the

facts that you have to take into account.”⁹ (Tr. p. 707)

Commissioner Turzai then went on to basically say that the Commission apportioned the

number of seats by the “regions” he described above. (Although it should be noted that it is

unclear which counties comprise each region, as these regions are creations of the Commission,

and not of either the Constitution or statute.)

So, through this statement, we have some suggestion of the methodology and framework

that the Commission used to begin its work.

Compare this to the methodology used by Amanda Holt in crafting her alternative maps.

Ms. Holt, in her testimony before the Commission, and in her submissions, indicated that she

determined the number of seats to be apportioned to each county first (based upon population

and a ratio calculation), then extends this analysis within counties, to municipalities, and within

municipalities to wards, in order to determine the minimum number of splits required under the

Constitution. Then, once population equality was achieved using the fewest number of splits,

additional splits were made to accommodate other legal considerations, such as the VRA.

In other words, the methodology used by Ms. Holt was based upon a starting point of

consideration of those factors listed in the Constitution, determining the ratio of each political

subdivision based upon population, starting with counties, to the size of an ideal seat. While it is

unclear what methodology was used by the Commission, Commissioner Turzai's remarks seem

⁹ Transcript of Proceedings, Legislative Reapportionment Commission, Volume XV, pages 696-731. (Meeting of June 8, 2012) Entire transcript at Appendix C

to indicate that he begins the task of redistricting with some amorphous and undefined "regional"

apportionment of seats which has no basis in the Constitution.

Commissioner Turzai goes on to explain that the 2012 Final Plan for the House was able to have less municipal splits than the previous plan which was struck down by the Court

"because we have a higher [population] deviation...." (Transcript, p. 710).

This explanation still does not account for the number of subdivision splits, of course, as the number of splits in the Holt plans is significantly less than that in the 2012 Final Plan, while also having a lower population deviation.

Thus, we argue, from Commissioner Turzai's own words, that the methodology used by

the Commission was not based, as a starting point, on the Constitution; further, the statement of Commissioner Turzai that the Commission had less splits because of a higher population

deviation is not credible, based upon the evidence submitted by Ms. Holt that significantly less splits are necessary with the same or similar population deviation.

WARDS

Later in his remarks, when discussing the number of split wards in the House Plan,

Commissioner Turzai pointed out his opinion that "...wards are a political creation. Why they have constitutional protection, I'm not quite sure, but wards are a political creation." In other words, Commissioner Turzai was implying that he does not believe that wards should be

protected from being split "unless absolutely necessary" despite their specific inclusion in our

Constitution.

Never mind, of course, that the boundaries of counties and municipalities are also

political creations. The creation of political subdivisions, and their borders, from counties to municipalities to wards, all have a historical basis, and all are political creations. At the 1968

Constitutional Convention, delegates decided to include "wards" in the text of Section 16 of

Article II, just as they decided to include counties, cities, boroughs and townships.

Whether the Commission, or any particular Commissioner, believes that wards should be afforded the same Constitutional protection as counties and municipalities is not important, as it is a mandate of our Constitution. However, we include Commissioner Turzai's comments here because they may provide some insight into the thinking of the Commission and the Commissioners as they approached their work.

SENIORITY

Commission Chairman McEwen also attempted to explain a part of the Commission's methodology at the June 8 meeting. He said, "I concluded that if a population loss in a region required loss of Senate seat, the seat to be moved must be a vacant seat. And if there was (sic) a vacant seat in the region, seniority should be the sole factor in identifying the sitting legislator who was to be evicted, since the uncontrolled or uncontrollable factor of seniority is the yardstick beyond control or suggestion of party politics or party affiliation." Transcript p. 726 It was this thinking that apparently caused the Commission to move the 40th Senatorial District to Monroe and Northampton Counties, as at the time of the Commission's June 8 meeting, the seat was vacant.¹⁰

However, the Senate Plan adopted by the Commission belies the claim of adherence to seniority as a decision point as well. The movement of one Senate seat from Allegheny County resulted in the 40th Senatorial District being moved to Monroe and Northampton Counties—or did it?

¹⁰ The 40th Senatorial District seat was vacant due to the resignation of Senator Jane Orie. It should also be noted that the incumbent in the 37th Senatorial District, Senator John Pippy, had announced that he was not seeking re-election, thus impacting the "seniority" question in that district as well.