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

No. 133 MM 2012

IN RE: 2011 LEGISLATIVE REAPPORTIONMENT PLAN FOR THE PENNSYLVANIA
SENATE AND THE PENNSYLVANIA HOUSE OF REPRESENTATIVES

PETITION OF AMANDA E. HOLT, ELAINE TOMLIN, LOUIS NUDI, DIANE EDBRIL,
DARIEL I. JAMIESON, LORA LAVIN, JAMES YOEST, JEFFREY MEYER,
CHRISTOPHER H. FROMME, TIMOTHY F. BURNETT, CHRIS HERTZOG, GLEN
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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. *See Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 724 (Pa. 2012) (“*Holt I*”).

II. STATEMENT OF SCOPE AND STANDARD OF REVIEW

A. SCOPE OF REVIEW

This Honorable Court’s review extends to the revised 2011 Legislative Reapportionment Plan adopted June 8, 2012 (the “Revised LRC Plan”) by the 2011 Legislative Reapportionment Commission (the “LRC”). The “scope of review in these appeals is plenary” and “entails consideration of all relevant evidence, and legal authority, that a Final Plan is contrary to law.” *Id.* at 733.

B. STANDARD OF REVIEW

Under the Constitution of Pennsylvania, Article II, Section 17(d), this Honorable Court reviews the Revised LRC Plan to determine whether it is contrary to law. PA. CONST. art. II, § 17(d). Petitioners have the burden of demonstrating that the Revised LRC Plan is contrary to law. *Holt I*, 38 A.3d at 735. A final legislative redistricting plan is contrary to law if, among other things, it violates the requirements set forth in Article II, Section 16, of the Constitution. *Id.*, 38 A.3d at 731. This Court’s review is “*de novo* or plenary” and “non-deferential.” *Id.* at 733-34 (citing *Pa. Turnpike Comm'n v. Com.*, 587 Pa. 347, 362-363, 899 A.2d 1085, 1094

(2006); *Pap's A.M. v. City of Erie*, 571 Pa. 375, 812 A.2d 591, 611 (2002); *Hertz v. Drivurself Stations v. Siggins*, 359 Pa. 25, 58 A.2d 464, 469 (1948). The Revised LRC Plan “is not entitled to a presumption of constitutionality.” *Id.* at 734. Indeed, “the Constitution does not dictate any form of deference to the LRC, it does not establish any special presumption that the LRC’s work product is constitutional, and it also places no qualifiers on this Court’s scope of review.” *Id.* at 730.

Further, the Revised LRC Plan “is not insulated from attack by decisions of this Court finding prior redistricting plans constitutional, unless a materially indistinguishable challenge was raised and rejected in those decisions.” *Id.* at 736 (citations omitted). This Court’s decisions have “not purported to set any immovable ‘guideposts’ for a redistricting commission to meet that would guarantee a finding of constitutionality.” *Id.* Instead: “*The ‘guideposts’ to which a redistricting commission is bound are the U.S. Constitution, the Pennsylvania Constitution, and this Court's relevant, specific holdings.*” *Id.* (emphasis added).

III. CONTROLLING CONSTITUTIONAL PROVISION

Section 16 of Article II of the Pennsylvania Constitution (“Section 16”) states in relevant part:

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.

IV. DETERMINATION IN QUESTION

The determination in question is the revised 2011 Legislative Reapportionment Plan for the Pennsylvania Senate and House of Representatives, as adopted on June 8, 2012, at a public meeting of the 2011 Legislative Reapportionment Commission.

V. STATEMENT OF QUESTIONS INVOLVED

1. Whether the Revised LRC Plan, considered as a whole, is contrary to law and must be remanded pursuant to Article II, Section 17(d) of the Pennsylvania Constitution because it contains numerous political subdivision splits that are not absolutely necessary, in violation of Article II, Section 16 of the Pennsylvania Constitution? *Holt I*, 38 A.3d at 718.

(Implicitly answered in the negative by the LRC)

2. Whether the Revised LRC Plan, considered as a whole, is contrary to law and must be remanded pursuant to Section 17(d) of Article II of the Pennsylvania Constitution because the LRC could have easily achieved a substantially greater fidelity to all of the mandates of Article II, Section 16 – compactness, contiguity, and integrity of political subdivisions, yet failed to do so, in violation of Section 16? *See Holt I*, 38 A.3d at 718.

(Implicitly answered in the negative by the LRC)

3. Whether, in light of the LRC’s repeated failure to adopt a plan that complies with Article II, Section 16 of the Pennsylvania Constitution, the Court should remand the Revised LRC Plan with an instruction to adopt a plan that contains no more splits or fractures of political subdivisions than the number of splits and fractures created under the proposed plan submitted by Petitioners?

(Implicitly answered in the negative by the LRC)

VI. STATEMENT OF THE CASE

A. FORM OF ACTION AND PROCEDURAL HISTORY

This is a Petition for Review of the revised 2011 Legislative Reapportionment Plan of the 2011 Legislative Reapportionment Commission, established pursuant to Article II, Section 17(b) of the Constitution of Pennsylvania.

The Revised LRC Plan stems from an earlier Legislative Reapportionment Plan, which was adopted on December 12, 2011 (the “Original LRC Plan”). The Original LRC Plan followed four public hearings held on September 7, 2011, September 14, 2011, November 18, 2011, and November 23, 2011, and three public administrative meetings held on October 31, 2011, December 7, 2011, and December 12, 2011. On January 11, 2012, several of the Petitioners filed a Petition for Review challenging the Original LRC Plan. This Court heard oral arguments for all petitions challenging the Original LRC Plan on January 23, 2012, and on January 25, 2012, held that the Original LRC Plan was “contrary to law” under the Pennsylvania Constitution and remanded the Original LRC Plan to the LRC.

On remand, the LRC held public meetings on February 22, 2012 and April 12, 2012, to consider the adoption of a Preliminary Revised Legislative Reapportionment Plan. In the intervening period, the LRC postponed public meetings that were originally scheduled for February 28, 2012 and March 2, 2012. On April 12, 2012, the same day as the second public meeting, the LRC adopted a Preliminary Revised Plan. In accordance with Article II, Section 17(c) of the Pennsylvania Constitution, Petitioner Holt and others timely filed exceptions to the Preliminary Revised Plan on or before May 14, 2012.

The LRC conducted public hearings to discuss the adoption of a Revised Final Plan at on May 2, 2012 and May 7, 2012. The LRC adopted the Revised LRC Plan at a public administrative meeting held on June 8, 2012. Petitioners filed their Verified Petition for Review of the Revised LRC Plan on July 9, 2012 (the “Petition”), pursuant to Article II, Section 17(d) the Pennsylvania Constitution, which provides that “any aggrieved person” may file an appeal directly to the Supreme Court 30 days from the filing of a final reapportionment plan.

On July 10, 2012, this Court directed the LRC to answer the Petition. LRC did so by verified Answer filed July 23, 2012 (the “Answer”).

B. PRIOR DETERMINATION

The prior governmental determination in this case is the revised 2011 Legislative Reapportionment Plan adopted by the LRC on June 8, 2012, and filed on that date with the Secretary of the Commonwealth of Pennsylvania. The Revised LRC Plan is not reported in an official case reporter. Relevant portions of the Revised LRC Plan and Map are attached to the Petition at Exhibits A and B.

C. AGENCY WHOSE DETERMINATION IS TO BE REVIEWED

The name of the agency whose determination is to be reviewed is the 2011 Legislative Reapportionment Commission.

D. FACTUAL CHRONOLOGY

Since the 1968 amendments to Article II, Section 17(a), of the Pennsylvania Constitution, a Legislative Reapportionment Commission has had the authority and obligation to redraw the lines of Pennsylvania Senate and House of Representatives districts following each decennial census.¹ The Commission consists of five members, four of whom are the Majority and Minority Leaders of the Pennsylvania Senate and the Pennsylvania House of Representatives, and the fifth of whom is a Chairman appointed by the four other members, or by the Supreme Court if they are unable to do so.

In the LRC’s public proceedings leading to the adoption of the Original LRC Plan, Petitioner Holt presented several “Section 16 Plans” showing that, state-wide, Pennsylvania’s voting districts could readily be reapportioned to account for population changes while still

¹ Before 1968, the full General Assembly had the constitutional obligation to reapportion the legislative districts.

maintaining the constitutional mandates for legislative districting – namely, equality of population, compactness, and contiguousness – and respecting the constitutional mandate that no political subdivision be divided unless absolutely necessary.

In *Holt I*, the Supreme Court agreed, holding that “the [Original LRC] Plan violate[d] the constitutional command to respect the integrity of political subdivisions.” *Id.* at 718. The Court further noted that “the [Holt] appellants have shown that the [LRC] could have *easily* achieved a *substantially* greater fidelity to all of the mandates in Article II, Section 16 – compactness, contiguity, and integrity of political subdivisions[.]” *Id.* (emphasis added). The Court thus remanded the Original LRC Plan to the LRC, and ordered it to fashion a revised Plan that comports with all constitutional requirements. *Id.* at 760-61. In doing so, the Court emphasized the LRC’s task in balancing the “multiple commands in Article II, Section 16, which embrace contiguity, compactness, and the integrity of political subdivisions,” as well as population equality. Therefore, the Court authorized a “recalibration of the emphasis respecting population equality to afford greater flexibility in reapportioning legislative districts by population” on remand. *Id.*

On remand, the LRC adopted a Preliminary Revised Plan on April 12, 2012, after one public meeting. Petitioner Holt and others timely filed exceptions to the Preliminary Revised Plan on or before May 14, 2012. Following issuance of the Preliminary Revised Plan, Petitioner Holt also submitted proposed alternative revised redistricting plans. She submitted a total of three such alternative revised plans for the Senate and the House, each of which proposed a dramatic reduction in subdivision splits and fractures as compared with the Preliminary Revised

Plan. Petitioner Holt thus provided multiple examples of how the LRC could easily comply with the requirements of Section 16.²

Petitioner Holt created the Revised Holt Plan in essentially the same manner that she created the Holt Plan addressed in the Court’s prior decision, designing it exclusively to satisfy the objectives of Section 16 and the requirements of Federal law. Thus, the Revised Holt Plan does not consider any factors such as enhancement of partisan voting power in a particular district, or preservation of incumbency, which fall outside of what is required by the Pennsylvania Constitution and Federal law. *See* Petition ¶¶ 38-40.

The only difference in methodology between the original Holt Plan and the Revised Holt Plan is that the latter plan, like the Revised LRC Plan, allows for a greater range of deviation from the ideal population of each House and Senate District, as contemplated by this Court’s opinion in *Holt I*. The 2010 census determined that the population of Pennsylvania is 12,702,379. This means that the ideal population of each Senatorial district would be 254,048; the ideal population of each House district would be 62,573. The Revised LRC Plan has a maximum deviation from this ideal population of 7.957 percent for Senate Districts and 7.872 percent for House Districts (compared to 3.89 and 5.98, respectively, in the Original LRC Plan). The corresponding percentages for the Revised Holt Plan are similar, but lower: 7.866 percent for Senate Districts and 7.751 percent for House Districts. *Id.* ¶ 39.

The LRC ignored the proposed alternative plans and the submissions of other petitioners and citizens, and adopted the Revised LRC Plan on June 8, 2012. The Revised LRC Plan split 135 more subdivisions in creating House Districts, and split 20 more subdivisions in creating Senate Districts, than the Revised Holt plan. That translated into an even greater differential in

² For ease of reference, Petitioners have selected one of the three revised alternative plans presented below by Petitioner Holt to compare as “the Revised Holt Plan,” which is attached as Exhibit C to the Petition.

the number of fractures — *i.e.*, the fragments of subdivisions remaining after a split. The Revised Holt Plan creates *335 fewer fractures* in House Districts and *56 fewer fractures* in Senate Districts – a total of 391 fewer fractures overall – than the Revised LRC Plan. Petition ¶ 42; *id.*, Ex. C; *see also Holt I*, 38 A.3d at 755 n.37 (noting that the number of subdivision fractures, as well as the number of split subdivisions, is relevant to the constitutional inquiry). In addition, the Revised LRC Plan created multiple districts that needlessly fall far short of the compactness and contiguity requirements of Article II, Section 16. Petition § 50-72.

E. DETERMINATION UNDER REVIEW

The determination under review is the determination of the 2011 Legislative Reapportionment LRC adopting the revised 2011 Legislative Reapportionment Plan on June 8, 2012.

F. PETITIONERS

Petitioners are voters in the Commonwealth of Pennsylvania who live in the Commonwealth's wards, municipalities, and counties the Revised LRC Plan split, often multiple times, to form Senate and House of Representative Districts in violation of Article II, Section 16.

They are:

- a. Amanda E. Holt of Allentown, whose County of Lehigh is split into seven House Districts;
- b. Elaine Tomlin of Philadelphia, whose Ward 42 is split into three House Districts, and City of Philadelphia into seven Senate Districts;
- c. Louis Nudi of Pittsburgh, whose Township of Ross is split into two House Districts.

- d. Diane Edbril of Radnor, whose County of Delaware is split into four Senate Districts, and whose Township of Radnor is split into two House Districts;
- e. Dariel I. Jamieson of Chesterbrook, whose County of Chester is split into four Senate Districts;
- f. Lora Lavin of Swarthmore, whose County of Delaware is split into four Senate Districts and eleven House Districts;
- g. James Yoest of Pittsburgh, whose Township of Ross is split into two House Districts;
- h. Jeffrey Meyer of Pittsburgh, whose Township of Ross is split into two House Districts;
- i. Christopher H. Fromme of Pittsburgh, whose Township of Ross is split into two House Districts;
- j. Timothy F. Burnett of Pittsburgh, whose Township of Ross is split into two House Districts;
- k. Chris Hertzog of Copley, whose County of Lehigh is split into seven House Districts;
- l. Glenn Eckhart of Allentown, whose County of Lehigh is split into seven House Districts, and whose Township of Salisbury is split into three House Districts;
- m. Joan Jessen of McMurray, whose county of Washington is split into two Senate Districts and seven House Districts;
- n. Lower Merion Township Commissioner Elizabeth Rogan of Wynnewood, whose Township of Lower Merion would be divided into four House Districts;

o. Cumberland County Commissioner James Hertzler of Enola, whose county of Cumberland would be divided into three Senate Districts;

p. Cumberland County Commissioner Gary Eichelberger of Mechanicsburg, whose county of Cumberland would be divided into three Senate Districts;

q. Cumberland County Commissioner Barbara B. Cross of Carlisle, whose county of Cumberland would be divided into three Senate Districts; and

r. Mary Frances Ballard of Wayne, whose county of Delaware is split into four Senate Districts and whose Township of Radnor is split into two House Districts.

G. STATEMENT AS TO PRESERVATION OF ISSUES

Objections to the Preliminary Revised Plan were filed by exception with the LRC on or before May 14, 2012, pursuant to Article 2, Section 17 (c) of the Pennsylvania Constitution. The LRC ignored and implicitly denied the exception by deciding not to eliminate the vast majority of the splits of political subdivisions present in the Preliminary Revised Plan when approving the Revised LRC Plan on June 8, 2012. In fact, the Revised LRC Plan actually increases the number of subdivision splits in the Senate relative to the Preliminary Revised Plan.

VII. SUMMARY OF ARGUMENT

The Commonwealth gets only one chance in ten years to redraw the districts which are the basis for representative government. Mindful of the political nature of the reapportionment process, through their Constitution the people of Pennsylvania imposed limitations on that process, in the belief that attaining compactness, contiguity, respect for political subdivisions and equality of population would protect the interests of citizens to a government which fairly represents their collective interests. This Court is the only place Pennsylvanians can go to enforce that foundational right. At a time of heavy partisanship and declining respect for

governmental leaders, adherence to clear constitutional commands designed to safeguard a fair political process not only sends a message of integrity and fidelity to the constitutional text, but also is vital in assuring citizens that their fundamental role in the system is not being unfairly manipulated.

In *Holt I*, this Court sent that message. It told the LRC to comply with the express requirements of Article II, Section 16 of the Pennsylvania Constitution (“Section 16”). Under *Holt I*, the redistricting mandates of Section 16 — compactness, contiguity, population equality, and respect for political subdivisions — may no longer be subverted to the LRC’s views of what is politically expedient. The LRC can no longer attempt to use the Court’s approval of redistricting plans in decades past to insulate new plans from review. And it can no longer refuse to consider alternative state-wide redistricting plans, including those prepared by concerned citizens like Petitioners here.

This Court sent its message loudly and clearly, but the LRC refused to listen. Like the Original LRC Plan that the Court rejected in *Holt I*, the Revised LRC Plan violates Section 16 by splitting numerous political subdivisions, creating hundreds of subdivision fragments that are not “absolutely necessary.” Pa. CONST. art. II, § 16. Once again, the LRC has attempted to justify its systematic shredding of the Commonwealth’s political subdivisions by reference to the LRC’s own prior plans, including the Original LRC Plan that the Court rejected in *Holt I*. And the LRC has once again disregarded alternative plans proposed by concerned citizens, even going so far as to claim that it lacks “sufficient information” regarding the Revised Holt Plan — prepared by the same Petitioner whose prior Plan provided the “powerful evidence” on which *Holt I* rests. *Holt I*, 38 A.3d at 756.

The LRC on remand has not only ignored the message of *Holt I*, but has squandered the opportunity provided by that decision. This Court in *Holt I* expressly provided the LRC with “greater flexibility” in achieving the equal population requirements of Section 16, for the specific purpose of ensuring that the LRC would place greater emphasis on the other mandates of Section 16. But analysis of the Revised LRC Plan shows that, even after taking account of the *Holt I*’s more flexible population equality standard, the LRC has not fulfilled any of the mandates of Section 16. Petitioners’ alternative plan once again shows that “*the LRC could have easily achieved a substantially greater fidelity to all of the mandates in Article II, Section 16 – compactness, contiguity, and integrity of political subdivisions,*” yet failed to do so. *Holt I*, 38 A.3d at 718 (emphasis added).

The evidence plainly satisfies the Petitioners’ burden of establishing that the Revised LRC Plan is contrary to law and must be remanded. Perhaps the more significant question is the appropriate directive to the LRC on remand. Petitioners submit that the LRC, having failed on two separate occasions to prepare a constitutional redistricting plan, should be given directions to prepare a plan on second remand that divides no more political subdivisions, and creates no more subdivision splits, than the Revised Holt Plan. Remand with this directive is the only way to ensure that the LRC will at long last hear the clear message of *Holt I*.

VIII. ARGUMENT

A. PETITIONERS HAVE STANDING

“Any aggrieved person may file an appeal from the [LRC’s] final plan directly to the Supreme Court within thirty days after the filing thereof.” Pa. CONST. art. II, § 17(d) (“Section 17(d)”). A registered voter who resides in a political subdivision that would be affected by a final redistricting plan is an aggrieved person for purposes of Section 17(d). *Albert v. 2001*

Legislative Reapportionment Comm'n, 567 Pa. 670, 678-79, 790 A.2d 989, 994, 996 (2002).

The LRC has admitted that each of the Petitioners is a registered Pennsylvania voter and lives in a political subdivision that would be divided under the Revised LRC Plan, and has further admitted that Petitioners have standing to challenge the Revised LRC Plan. *See* Petition ¶¶ 2-20; Answer ¶¶2-20. Thus, Petitioners have standing under Section 17(d).

B. THE REVISED LRC PLAN IS CONTRARY TO LAW BECAUSE IT VIOLATES SECTION 16

Section 16 provides:

The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, *which shall be composed of compact and contiguous territory as nearly equal in population as practicable*. Each senatorial district shall elect one Senator, and each representative district one Representative. *Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district*.

Pa. CONST. art. II, § 16 (emphasis added). A redistricting plan violates Section 16, and is thus contrary to law, if the plan, “considered as a whole, *contains numerous political subdivision splits that are not absolutely necessary*.” *Holt I*, 38 A.3d at 718 (emphasis added). A redistricting plan also violates Section 16 if “*the LRC could have easily achieved a substantially greater fidelity to all of the mandates in Article II, Section 16 – compactness, contiguity, and integrity of political subdivisions*,” yet failed to do so. *Id.* (emphasis added).

Here, the record on appeal demonstrates that the Revised LRC Plan is contrary to law for *both* reasons. It creates numerous political subdivision splits that are not absolutely unnecessary, and the LRC could have easily adopted an alternative plan that achieves substantially greater fidelity to all of Section 16’s mandates.

C. THE REVISED LRC PLAN CREATES NUMEROUS SUBDIVISION SPLITS THAT ARE NOT “ABSOLUTELY NECESSARY”

In *Holt I*, this Court held that alternative redistricting plans may be offered “as proof that the LRC’s Final Plan contained subdivision splits that were not absolutely necessary.” *Holt I*, 38 A.3d at 755. The Court then reviewed the Original Holt Plan, and compared it to the Original LRC Plan, focusing on “the raw number difference in subdivision splits” under each plan. *Id.* at 753-754. Based on this comparison, the Court concluded:

This plan [*i.e.*, the Original Holt Plan] shows that *a redistricting map could readily be fashioned* which maintained a roughly equivalent level of population deviation—the LRC’s primary justification for the numerosity of the political subdivisions it divided—as the Final Plan, while *employing significantly fewer political subdivision splits* with respect to both Chambers of the General Assembly.

Id. (emphasis added). The Court also noted that Petitioners had “offered specific examples of political subdivisions with populations smaller than the ideal House or Senate district which were maintained intact in the alternative plan while maintaining appropriate levels of population deviation.” *Id.*

Based on this evidence, *Holt I* concluded that Petitioners had met their burden of proving that the Original LRC Plan violated Section 16’s “unless absolutely necessary” clause, and thus was contrary to law. *Id.* at 755, 756. The Court explained:

The Holt alternative plan avoided a highly significant percentage of political subdivision splits and fractures while maintaining a lower average population deviation from the ideal than the 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 proved was easily achievable. *This powerful evidence, challenging the Final Plan as a whole, suffices to show that the Final Plan is contrary to law. . . .*

Id. at 756 (emphasis added).

As discussed below, Petitioners have presented the same type and quality of evidence with respect to the Revised LRC Plan that the Court found sufficient in *Holt I* to establish that the Original LRC Plan was contrary to law. Specifically, Petitioners have presented an alternative redistricting plan, prepared in accordance with *Holt I*'s guidance concerning population equality, which “maintain[s] a roughly equivalent level of population deviation . . . while employing significantly fewer political subdivision splits.” *Id.* at 753. Petitioners also have provided specific examples of unnecessary subdivision splits in the Revised LRC Plan. Petitioners’ evidence this time is as powerful as it was last time. It establishes that the Revised LRC Plan violates Section 16.

1. THE REVISED HOLT PLAN SHOWS THAT THE LRC AGAIN CREATED HUNDREDS OF UNNECESSARY SPLITS

In accordance with Article II, Section 17(c), Petitioner Holt submitted written “exceptions” to the LRC’s preliminary revised plan on remand from *Holt I*, which included the detailed maps and charts that comprise the Revised Holt Plan. *See* Petition ¶ 38; *id.*, Exs. C and D. Like the Original Holt Plan considered in *Holt I*, the Revised Holt Plan kept intact all political subdivisions within a specified percentage deviation from equal population, and split other subdivisions only to the extent necessary to comply with voting equality and Voting Rights Act (“VRA”), 42 U.S.C. §1973, requirements. Petition § 40; *id.*, Ex. C, *passim*. The Revised Holt Plan used a maximum deviation of ideal population of 7.87 for Senate Districts and 7.75 percent for House Districts. Petition § 39; *id.*, Ex. C at 4, 6. These percentages deviations were *lower* than the corresponding deviations under the Revised LRC Plan: 7.96 for Senate Districts and 7.87 for House Districts. Petition § 39; *id.*, Ex. C at 4, 6.

Despite using a somewhat lower maximum deviation of ideal district population, Petitioner Holt’s alternative plan once again demonstrated that the LRC could have easily

avoided large numbers of split political subdivisions and political subdivision fractures. The following chart shows the “raw number difference in subdivision splits” between the Revised Holt Plan and the Revised LRC Plan. The chart provides the same types of data that the Court considered in *Holt I* – i.e., the number of subdivisions that were split and the number of resulting subdivision “fractures.”

COMPARISON OF REVISED LRC AND HOLT PLANS

<u>HOUSE</u>	<u>Revised LRC</u>	<u>Revised Holt</u>	<u>Difference</u>
	<u>Plan</u>	<u>Plan</u>	
Split Counties	50	44	6
Split Municipalities	68	17	51
Split Wards	103	25	78
Total Split Subdivisions	221	86	135
Total County Fractures	271	227	44
Total Municipal Fractures	183	64	119
Total Ward Fractures	225	53	172
Total Subdivision Fractures	679	344	335
<u>SENATE</u>	<u>Revised LRC</u>	<u>Revised Holt</u>	<u>Difference</u>
	<u>Plan</u>	<u>Plan</u>	
Split Counties	25	15	10
Split Municipalities	2	2	0
Split Wards	10	0	10
Total Split Subdivisions	37	17	20
Total County Fractures	78	44	34
Total Municipal Fractures	10	8	2
Total Ward Fractures	20	0	20
Total Subdivision Fractures	108	52	56

This data is every bit as striking as the similar data presented in *Holt I*. It shows that, in drawing House Districts, *the LRC split 135 more political subdivisions than it had to, creating 335 subdivision fractures that were not “absolutely necessary.”* In drawing Senate Districts, *the*

LRC split 20 more divisions than it had to, creating 56 subdivision fractures that were not “absolutely necessary.”

The absolute numbers of *excessive* splits and fractures are remarkable by themselves, but also when considered as a *percentage* of total splits and fractures under each plan. For both the Senate and the House, the above data shows that the Revised LRC Plan split more than *twice* as many subdivisions, and created about *twice* as many fractures, as the Revised Holt Plan. This means that the number of subdivisions split and subdivision fractures created by the Revised LRC Plan easily could have been reduced by approximately 50 percent.

Therefore, “the raw number difference in subdivision splits” once again demonstrates, as it did in *Holt I*, that “a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation . . . as the [Revised LRC] Plan, while employing significantly fewer political subdivision splits with respect to both Chambers of the General Assembly.” *Holt I*, 38 A.3d at 753-754.

Moreover, as in *Holt I*, Petitioners have once again “offered specific examples of political subdivisions with populations smaller than the ideal House or Senate district which were maintained intact in the alternative plan while maintaining appropriate levels of population deviation.” *Id.* Like the Original LRC Plan, the Revised LRC Plan created *multiple* fractures of subdivisions whose populations were *smaller* than the ideal House and Senate District population and therefore should not have been split at all, because no valid countervailing considerations necessitated a split.

The following are among the examples of such unnecessary fractures in the House:

- The 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. There are no equal population, VRA or other requirements that justified even a single split, much less *four*.

- The Final Plan split Philadelphia Ward 42 into *three* House Districts even though it is only 52.26% of an ideal House district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Philadelphia Ward 48 into *three* House Districts even though it is only 33.14% of an ideal House district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Philadelphia Ward 54 into *three* House Districts even though it is only 38.16% of an ideal House district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Ridley Township Ward 1 (in Delaware County) into *three* House Districts even though it is only 4.05% of an ideal House district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Upper Dublin (in Montgomery County) into *three* House Districts even though it is only 40.86% of an ideal House district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Swatara (in 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 that justified even a single split, much less *three*.
- The Final Plan split Ross Township (in Allegheny County) into *two* House Districts even though it is only 49.71% of an ideal House district population. There are no equal population, VRA or other requirements that justified even a single split, much less *two*.
- The Final Plan split Lancaster Township (in Lancaster County) into *four* House Districts even though it is only 25.81% of an ideal House district population. There are no equal population, VRA or other requirements that justified even a single split, much less *four*.
- The Final Plan split South Whitehall (in Lehigh County) into *three* House Districts even though it is only 30.65% of an ideal House district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.

See Petition ¶¶ 44a.-j.

The Revised LRC Plan takes a similar approach in the Senate, routinely creating multiple fractures of subdivisions that should not be split at all. Among other examples:

- The Final Plan split Philadelphia Ward 12 into *two* Senate Districts even though it is only 8.65% of an ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *two*.
- The Final Plan split Philadelphia Ward 21 into *two* Senate Districts even though it is only 17.44% of an ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *two*.
- The Final Plan split Huntingdon into *two* Senate Districts even though it is only 18.07% of an ideal Senate district population. There are no equal population, VRA or other requirements that justified this split.
- The Final Plan split Warren County into *two* Senate Districts even though it is only 16.46% of an ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *two*.
- The Final Plan split Butler County into *three* Senate Districts even though it is only a -27.63% deviation from the ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *three*.
- The Final Plan split Washington County into *two* Senate Districts even though it is only a -18.20% deviation from the ideal Senate district population. There are no equal population, VRA or other requirements that justified even a single split, much less *two*.
- The Final Plan split Cumberland County into *three* Senate Districts even though it is only 92.66% of an ideal Senate district population. There are no equal population, VRA or other requirements that justify even two splits, much less *three*.

Petition ¶¶ 46.k.-q.

In sum, Petitioners' challenge to the Revised LRC Plan presents the same "powerful evidence" which this Court held in *Holt I* is sufficient to carry Petitioners' burden of proving that the Revised LRC Plan violates Section 16. A simple comparison of the Revised LRC Plan to the Revised Holt Plan demonstrates that LRC once again created hundreds more subdivision

fractures than were necessary. And the evidence once again includes numerous specific examples of subdivision fractures that serve no legitimate purpose. Thus, under *Holt I*, the evidence shows that the Revised LRC Plan, considered as a whole, violates Section 16 and therefore is contrary to law.

2. THE LRC OFFERS NO VALID RESPONSE TO PETITIONERS' EVIDENCE

The LRC has purported to deny certain averments in the Petition with respect to the Revised Holt Plan, the comparison of that plan to the Revised LRC Plan and the specific examples of unnecessary subdivision fractures described above. This Court directed the LRC to Answer Petitioners' Verified Petition, and the LRC filed an Answer, also verified, on July 23, 2012. Accordingly, the adequacy of the LRC's responses to the Petition should be evaluated in accordance with traditional petition and answer rules. Under those rules, denials of factual averments must be specific; a general denial has the effect of an admission. *See* Pa. R.C.P. 1029(b). Lack of knowledge or information is not a sufficient basis for a denial, unless the answering party pleads that it has conducted a reasonable investigation. Pa. R.C.P. 1029(c).³

The LRC has generally denied Petitioners averments with respect to preparation of the Revised Holt Plan, and the population deviations under that plan, due to lack of "sufficient information." Petition ¶ 39; Answer ¶ 39. This response is insufficient, and the averment is deemed admitted, because the LRC has not alleged that it conducted a reasonable investigation. As this Court noted in *Holt I*, the LRC "is certainly capable of ascertaining and formulating fact-specific claims as to individual plans, and could have done so here." *Holt I*, 38 A.3d at 753 n.31.

³ Rule 1517 of the Rules of Appellate Procedure provides for application of the Civil Procedure Rules to pleadings in original jurisdiction petitions for review. However, appeals from the LRC's decisions are exempt from the general rule that no responsive pleading is required for appellate jurisdiction petitions. Pa. R.A.P. 1516(a).

As to Petitioners' averments with respect to examples of unnecessary fractures, the LRC offers no response to the facts in those averments, but merely engagements in legal argument as to the significance of those facts. Petition ¶¶ 45, 46; Answer ¶¶ 45, 46. Accordingly, all of the facts set forth in these paragraphs must be deemed to have been admitted.

With respect to the Petitioners' averments comparing the Revised Holt Plan and the Revised LRC Plan, the LRC avers that the Senate Districts under the Revised LRC Plan split 37 (not 38) subdivisions, resulting in 71 (not 72) total splits in the Senate, and that the House Districts split 221 (not 223) subdivisions, resulting in 458 (not 460) total splits in the House. Petition ¶ 42; Ans. ¶ 42. These differences also affect the number of "fractures," reducing the total number of fractures under the Revised LRC Plan by 4 in the House (from 683 to 679), and by 2 in the Senate (from 110 to 108). These differences are attributable to the fact that the data reflected in the Petition included a small number of split voting precincts. To eliminate any factual or legal argument in this regard, Petitioners have simply adopted the LRC's numbers as set forth in its Answer. All of the numbers set forth earlier in this brief have been adjusted accordingly.

The LRC's only other objection is to Petitioners' data concerns the use of subdivision "fractures" – *i.e.*, the number of subdivision fragments caused by a split. The LRC contends that the total number of "fractures" is an "artificial number." Ans. ¶ 41. However, this Court in *Holt I* specifically rejected the LRC's objection to the use of "fractures." *Holt I*, 38 A.3d at 755 n.37. The LRC's attempt to revisit that already-decided issue has no merit.

In sum, with the exception of the slight discrepancy between Petitioners' and the LRC's count of total splits and fractures, the LRC has not validly disputed any of the material factual averments in the Petition bearing on its violation of Section 16. As to that single exception,

Petitioners' brief eliminates any factual dispute by accepting the LRC's minor adjustment for purposes of this appeal.

3. DIFFERENCES BETWEEN THE REMANDED LRC PLAN AND THE REVISED LRC PLAN ARE IRRELEVANT

The LRC's Answer argues that the Revised LRC Plan satisfies Section 16 because it "reduces the number of split subdivisions from the remanded 2011 Final Plan and the existing (2001) districts." Ans. ¶ 41. In effect, the LRC argues – and this seems to be its *only* argument – that it did better this time than it did last time, and that this should be enough for Section 16. In fact, under the standards announced in *Holt I*, the Revised LRC Plan represents no meaningful improvement over the Original LRC Plan. In any event, the LRC's failed effort to compare the Revised LRC Plan to the Original LRC Plan and previous redistricting plans must be rejected.

First, *Holt I* already expressly rejected the LRC's attempt to justify a redistricting plan by reference to prior plans. The Court held that the LRC could not justify excessive subdivision splits in the Original LRC Plan by comparing it to the 2001 reapportionment plan. *Id.* ("[T]he current Final Plan is not insulated from attack by decisions of this Court finding prior redistricting plans constitutional[.]"). This Court clarified that "in the prior redistricting appeals, [it] merely passed upon the specific challenges that were made." *Id.* The 2001 reapportionment plan, "like every other plan since 1971," was challenged on a piecemeal basis and "was not challenged with compelling, objective, concrete proof that a large number of political subdivision splits were not 'absolutely necessary.'" *Id.* at 755-56 (emphasis added). In any event, the Court's redistricting decisions have "not purported to set any immovable 'guideposts' for a redistricting commission to meet that would guarantee a finding of constitutionality." *Id.* at 736.

Thus, the LRC cannot attempt to use any prior decisions of this Court to justify the absurdly excessive numbers of split subdivisions and subdivision fractures in the Revised LRC Plan. *A fortiori*, the LRC’s attempt to justify the Revised LRC Plan by comparing it to the Original LRC Plan must be summarily rejected. If prior “approved” reapportionment plans cannot serve as a guidepost for a permissible redistricting plan, it is nonsensical for the LRC to contend that the Original LRC Plan – which *Holt I* held *unconstitutional* – provides a legitimate reference point of any kind. The question here is not whether the LRC has marginally improved on its prior deficient performance. The question is whether the LRC has satisfied its obligations under Section 16. *Id.* at 736-37. Clearly it has not.

Second, the LRC’s attempt to use the Original LRC Plan or any previously approved redistricting plan as a reference point also must be rejected because *Holt I*’s equal population analysis dramatically reduced the number of subdivision splits that are absolutely necessary. *Holt I* concluded that the LRC should be afforded “greater flexibility” to deviate from strict population equality, thus reducing the number of necessary subdivision splits and making it easier to achieve Section 16’s compactness and contiguity requirements. *Holt I*, 38 A.3d at 760-761. On remand, the LRC responded by increasing its maximum population deviation percentage to 7.957 for Senate Districts (from 3.89 in the Original LRC Plan) and 7.872 for House Districts (from 5.98 in the Original LRC Plan). Using similar but *lower* population deviations, the Revised Holt Plan reduced the number of necessary split subdivisions by 19 percent (from 106 to 86) in the House and 37 percent (from 27 to 17) in the Senate. *See* Exhibit C hereto. The percentage reductions in the Revised LRC Plan are comparable, indicating those reductions are almost entirely attributable to the more flexible equal population standard. They

clearly are not attributable to any effort by the LRC to meet Section 16's strict "absolutely necessary requirement."

The rejected Original LRC Plan *never* provided a relevant benchmark for measuring compliance with Section 16, and it is not a relevant measure of *anything* now that the Court has changed Section 16 goal line by offering greater flexibility with respect to population equality. Thus, the Court should summarily reject the LRC's constant refrain that the Revised LRC represents an improvement over the Original LRC Plan that this Court rejected in *Holt I*.

The number of splits under the Revised LRC Plan, while marginally reduced due to the relaxed population equality standard, remains far too high to satisfy the unambiguous mandate of Article II, Section 16 of the Constitution. In *Holt I*, the Court held that the Original LRC Plan was unconstitutional where Petitioner Holt presented alternatives demonstrating that the total number of splits could be reduced by more than 50%. Given this level of disparity, the Court determined that it was "inconceivable, to borrow from one of the U.S. Supreme Court's equal protection decisions, that the magnitude of the subdivision splits here was unavoidable." *Id.* at 757 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 532 (1969)). The same remains true here. After applying a comparable adjustment to population deviation, the Revised Holt Plan again demonstrates that the LRC could "easily achieve[]" a reduction in unnecessary subdivision splits of approximately 50 percent. *Id.* at 718. Therefore, the "magnitude" of excess subdivision splits is almost exactly the same, and it is equally "inconceivable" these excess splits were "unavoidable," particularly given the increased flexibility the Court provided to the LRC in terms of population equality.

In sum, the LRC cannot point to past reapportionment plans or the unconstitutional Original LRC Plan in order to justify the excessive number of splits created by the Revised LRC Plan.

D. THE LRC COULD HAVE EASILY ACHIEVED SUBSTANTIALLY GREATER FIDELITY TO ALL OF SECTION 16'S MANDATES

The Constitution specifically mandates that the senatorial and representative districts “shall be composed of *compact* and *contiguous* territory as nearly *equal in population* as practicable” Pa. CONST.. art. II, § 16 (emphasis added). “[T]he guiding principles respecting compactness, contiguity, and respect for the integrity of political subdivisions . . . have deep roots in Pennsylvania constitutional law. . . .” *Holt I*, 38 A.3d. at 745. ⁴ The Court in *Holt* recognized the need to balance 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.’” *Id.* at 757. However, the number of subdivision splits in the Revised LRC Plan cannot possibly be justified by an effort to satisfy these commands. As with the Remanded LRC Plan, “the appellants have shown that the LRC could have easily achieved a substantially greater fidelity to all of the mandates in Article II, Section 16 -- compactness, contiguity, and integrity of political subdivisions -- yet the LRC did not do so in the Final Plan.” *Id.* at 718. The Revised Holt Plan, like the proposed plan presented by Petitioners in *Holt*, stands as powerful evidence that a significant reduction in splits is possible while still improving on population equality, compactness and contiguity.

⁴ The requirements that legislative districts “shall be divided into districts of compact and contiguous territory” have been a part of the Pennsylvania Constitution since 1874. *See* Art. II, §§ 16 & 17 (1874).

1. THE EXCESSIVE SPLITS UNDER THE REVISED LRC PLAN CANNOT BE JUSTIFIED ON EQUAL POPULATION GROUNDS

In *Holt I*, this Court provided prospective guidance for remand that clarified the LRC’s obligation to balance the multiple imperatives articulated in Article II, Section 16. *Id.* at 760. With respect to equal protection concerns, this Court explained that “the ‘practicable’ modifier in the ‘as nearly equal in population as practicable’ language necessarily leaves room for the operation of other constitutional commands.” *Id.* at 756. The requirements of Section 16 – compactness, contiguity, and integrity of political subdivisions – are “legitimate state interests that may affect, *and warrant*, deviations in population equality.” *Id.* at 760 (emphasis added).

Equality of population “does not require that reapportionment plans pursue the narrowest possible deviation.” *Id.* Further, the LRC cannot consider the range of deviation found in a prior reapportionment plan to be a constraint that justifies the subdivision splits and fractures created by the Revised LRC Plan. *Id.* at 736. As the *Holt* decision recognized, “no decision of this Court has purported to establish, or ‘grandfather in,’ any particular maximum level of population deviation.” *Id.* With this “greater flexibility” in reapportioning the districts by population, the LRC had the ability to adopt a final reapportionment plan that “achieved a substantially greater fidelity” to the other mandates of Section 16. *Id.* at 718.

The Revised LRC Plan, however, contains *hundreds* of subdivision splits and fractures that cannot be justified on equal population grounds. Population equality cannot justify the splits or fractures created by the Revised LRC Plan because the Revised Holt Plan achieves a *lower* maximum deviation from the ideal Senate and House District Population than the Revised LRC Plan. The Revised LRC Plan has a maximum deviation from ideal population of 7.957 percent for Senate Districts and 7.872 percent for House Districts. The corresponding percentages for the Revised Holt Plan are smaller – 7.866 percent for Senate Districts and 7.751 percent for House

Districts. Even the *Original* Holt Plan – which had about *half* the maximum population deviation of the Revised LRC Plan – achieved significantly fewer splits and subdivision fractures than the Revised LRC Plan. Petitioner Holt’s analysis has once again demonstrated that, as stated in *Holt*, “a redistricting map could readily be fashioned which maintained a roughly equivalent level of population deviation ... as [the Revised LRC] Plan, while employing *significantly fewer political subdivision splits* with respect to both Chambers of the General Assembly.” *Holt*, 38 A.3d at 753 (emphasis added).

2. THE REVISED LRC PLAN ALSO VIOLATES THE COMPACTNESS REQUIREMENT

In addition to the unnecessary subdivision splits created by the Remanded LRC Plan, this Court in *Holt* expressed concerns “particularly respecting compactness” and pointed to three particular Senate districts as examples of territories presenting “obvious ‘compactness’ issues” based solely on visual review. *Id.* at 757. While this Court has recognized that “there is a certain degree of **unavoidable** non-compactness in any apportionment scheme,” *id.* at 758 (quoting *Com. ex rel. Specter v. Levin*, 448 Pa. 1, 19, 293 A.2d 15, 24 (1972)) (emphasis in original), the objective data supplied by Petitioners shows that the compactness issues in the Revised LRC Plan are indisputably avoidable, as the LRC failed to heed the Court’s concerns as stated in *Holt I*.

In evaluating compactness, this Court has required “concrete or objective data indicating that the districts established by the LRC’s plan lack compactness.” *Specter*, 293 A.2d at 24. Petitioners satisfy this requirement by supplying the LRC and the Court with “Polsby & Popper” compactness data showing that the Revised LRC Plan perpetuates the problems that existed under the Remanded LRC Plan. See Pet. ¶¶ 50-65, Exs. E & F. This data reveals that the

Revised LRC Plan scores significantly lower on an objectively verifiable compactness scale than the Revised Holt Plan, and the LRC has no meaningful response on this point.

The Polsby & Popper method has been widely recognized as a means of measuring compactness “quantitatively in terms of dispersion, perimeter, and population ratios.” *Vieth v. Jubelirer*, 541 U.S. 267, 349 & n.3 (2004) (Souter, J., dissenting) (citing Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL’Y REV. 301, 339–351 (1991) (other citations omitted)). It “is a perimeter measure that considers how efficiently the area of a district is encompassed by its perimeter and boundary.” *Committee for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 570 (N.D. Ill. 2011). This measure compares the shape of a given district to the smoothness of a circle by “comput[ing] a ratio based on the area of the district compared to a circle that equals the length of the perimeter of the district.” .” *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100, 109 n.6 (2002). The objective formula used to compute the ratio yields a score between 0 and 1.0, with 0 being the least compact possible district and 1.0 being the most compact district possible.⁵ Polsby & Popper, 9 YALE L. & POL’Y REV. at 349-50 & n.207.

Comparing the available alternatives as a whole, the average Polsby & Popper score for the Senate districts under the Revised LRC Plan is 0.275, as compared to 0.351 under the Revised Holt Plan. In the House, the average Polsby & Popper score under the Revised LRC Plan is 0.277, as compared to 0.372 under the Revised Holt Plan. The Revised Holt Plan therefore offers Senate districts that are more than 27% more compact and House districts that

⁵ A perfect circle yields a “perfect” score of 1.0 under this formula, which is designed to measure “smoothness,” taking away points for any irregular boundaries in a boundary line. . . districts with appendages or indentations will always score worse than those without.”

are more than 34% more compact. Moreover, the Revised Holt Plan achieved a greater degree of compactness in 40 out of 50 Senate Districts and 161 out of 203 House Districts.

In its Answer, the LRC ignores that Petitioners have offered viable alternative plans that improve compactness significantly, instead attempting to focus on an irrelevant comparison between the Revised LRC Plan and the invalid Remanded LRC Plan. Still, the LRC provides no support for its sweeping statements that the Revised LRC Plan “is significantly more compact than the remanded 2011 Plan and the existing (2001) districts,” or that the three Senate districts highlighted by the Court in *Holt I* are now “significantly more compact.” In any event, the available data demonstrates that any purported improvement to the compactness of the revised districts is marginal at best, and insufficient to remedy the compactness concerns raised in *Holt*. Under the Remanded LRC Plan, each of the three non-compact Senate districts highlighted by the Court in *Holt I* scored 0.176 or lower on the Polsby & Popper scale. While the score for these three specific districts has improved to varying degrees under the Revised LRC Plan, a high number of districts across the Commonwealth continue to score 0.176 or less. Specifically, 22% of Senate Districts (including SD 3)⁶ and 18% of House Districts under the Revised LRC Plan fail to achieve a Polsby & Popper score higher than 0.176.⁷

By comparison, none of the Senate Districts and only 4% of the House Districts under the Revised Holt Plan has a Polsby & Popper score of 0.176 or less. The LRC’s response – that it made some purported improvement to three obviously deficient districts in a plan that was

⁶ Regarding the particular districts discussed in *Holt*, SD 3 remains as a stark example of a non-compact district with a Polsby & Popper score below 0.176. SD 15 and 35 have been made more “compact” in the Revised LRC Plan, but the LRC does not deny that this was accomplished at the expense of neighboring districts – SD 48 and SD 30 are now less compact than they were in the Remanded LRC Plan.

⁷ The correlation between oddly-shaped districts and Polsby & Popper scores lower than 0.176 is evident upon a simple visual review of the low-scoring districts in the Revised LRC Plan. See Ex. A (Senate Plan), SD 18, 19, 20, 30, and 48; Ex. B (House Plan), HD 10, 14, 17, 35, 38, 54, 77, 82, 134, 172, 173, 177, 179, 191, and 197.

rejected by the Court – misses the point. The revised districts are still significantly less compact than the alternative, and comparison to the Revised Holt Plan demonstrates that the compactness problems under the Revised LRC Plan are not unavoidable. While the LRC’s Answer parrots the statement that the Commonwealth “is made up of counties, municipalities and wards which, themselves, are irregularly shaped,” the LRC points to no district that it contends is non-compact based on the irregular shape of an underlying political subdivision. Rather, as it undisputed that the Revised Holt Plan was drawn against the same background of preexisting Pennsylvania subdivision boundaries, yet achieves greater compactness with fewer subdivision splits.

Critically, the LRC does not dispute that the districts proposed in the Revised Holt Plan are more compact than the districts created by the Revised LRC Plan. Therefore, as with the Original LRC Plan, the alternative plan proffered by Petitioners stands as powerful evidence that the LRC’s superfluous subdivision splits could not have been created based on any effort to satisfy the constitutional compactness requirement.

Rather than disputing the substance of Petitioners’ compactness data, LRC simply states that Polsby & Popper “is one of many” available methods that “attempts to quantify the ephemeral concept of compactness.” Significantly, however, the LRC does not dispute the accuracy of the compactness scores provided by Petitioners. Nor does it offer any alternative “concrete or objective data” on the issue of compactness, or any other reason to question the viability of the Polsby & Popper method to measure compactness.⁸ Regardless of the method used to measure compactness, however, the LRC ultimately does not, and cannot, dispute that the Revised Holt Plan reduces splits while simultaneously improving compactness.

⁸ The Polsby & Popper formula is the “[m]ost common method of measuring compactness.” AZAVEA, *Compactness Metrics* (Nov. 11, 2011), available at http://www.fairshapepa.org/wp-content/uploads/2011/11/Compactness-Metrics_2011_11_11-4.docx (last visited July 9, 2012).

3. THE REVISED LRC PLAN ALSO VIOLATES THE CONTIGUITY REQUIREMENT

A contiguous district is “one in which a person can go from any point within the district to any other point [within the district] without leaving the district,” or one in which “no part of the district is wholly physically separate from any other part.” *Specter*, 488 Pa. at 18-19, 293 A.2d at 24. One reason for insisting upon contiguity as an important redistricting principle is because it is an “objective factor.” *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Here, the contiguity issues that existed under the Remanded LRC Plan persist in the Revised LRC Plan. The prior plan rejected by the Court in *Holt I* contained seven non-contiguous House districts. See 1/18/2012 Consol. Br. of Respondent LRC at p.18, n.10 (claiming only 45 persons lived in the non-contiguous portions)⁹. Acknowledging the interplay between the multiple commands of the Constitution, and in order to make fidelity to the command for contiguity, compactness and respect for political subdivisions easier to accomplish, the Court gave the LRC flexibility in considering population equality: “This adjustment should allow more breathing space for concerns of contiguity, compactness, and the integrity of political subdivisions to be respected.” *Holt I*, 38 A.3d at 759.

Remarkably, despite this clear direction and additional flexibility provided by the Court, the LRC has produced a final plan that *again* has seven non-contiguous House districts. See Answer ¶ 70. In other words, the LRC took the opportunity to increase population deviation, but failed to use this increase as intended by the Court – *i.e.*, to eliminate or even at least reduce the number of non-contiguous districts.

Here is the LRC’s purported justification for this blatant disregard of the Court’s mandate:

⁹ It is undisputed that the number of people living in a particular territory has no constitutional relevance in evaluating whether a legislative district is contiguous. See Pet. ¶ 67.

These occur only when there is a non-contiguous municipality which, in turn, has a noncontiguous voting precinct. The 2012 Final Plan chose to keep these non-contiguous precincts of non-contiguous municipalities together with their municipality and precinct. This resulted in nine “islands” of one district located within another (indeed, they are actually “islands” of a particular municipality and voting district located within another by accident of the Commonwealth's political geography).

Answer ¶ 66. This justification for the contiguity problems in the Revised LRC Plan lacks merit for at least three reasons.

First, this explanation is simply untrue as to at least two of the seven non-contiguous districts. House Districts 43 and 97 both contain non-contiguous territories, which are part of non-contiguous municipalities. However, in each case, the LRC’s decision to split the underlying municipality among multiple House districts belies the notion that the LRC had to create a non-contiguous district in order to keep the municipality intact. Specifically, House District 43 includes two non-contiguous territories from Lancaster Township, but that township was divided between four House districts. The same is true of Manheim Township, which was divided between three House districts and yet still creates a non-contiguous House District 97. The lack of contiguity has nothing to do with municipal integrity in these cases.

Second, there are at least 35 other municipalities with non-contiguous areas, which the LRC did not find necessary to create non-contiguous islands in a different legislative district. Rather, the LRC only found it convenient to do this in 12 instances.¹⁰ Thus, the LRC seems to suggest (without explanation) that a non-contiguous municipality sometimes justifies a non-contiguous legislative district, and sometimes it does not. The Court should not permit the LRC

¹⁰ The Holt petition cited 12 instances (Pet. ¶ 69). The LRC’s answer claims there are only 9. Because the LRC failed to identify the nine non-contiguous territories (which they called “islands”) contained in their plan, it is impossible to know to which “islands” they refer. A comparison between the 2010 Census block maps and the LRC’s legal description clearly shows that 12 “islands” exist in the Revised LRC House Plan. The non-contiguous district maps attached hereto at Exhibit D illustrate and further describe these “islands.”

to apply the contiguity requirement – a standard utilized for its “objectiveness” – in such a subjective and discretionary manner. Contiguity is a constitutional mandate and not an issue of practicality and/or convenience to the LRC.

Third, the LRC’s stated justification misses the point by focusing on the purported discontinuous nature of municipal boundaries. The issue in each of these seven non-contiguous districts is the LRC’s failure to include the intervening territory in the same legislative district as the non-contiguous municipality. That is completely within the LRC’s discretion, and the Revised Holt Plan demonstrates that the underlying municipalities can be kept whole and the legislative districts made contiguous. Thus, it is the LRC’s own line-drawing decisions, and *not* the “accident of the Commonwealth’s political geography,” which explains why 8 out of at least 45 non-contiguous municipalities were not included in a single contiguous legislative district.

No constitutional reason has been demonstrated for permitting non-contiguity in the Revised LRC Plan. Non-contiguous legislative districts are not necessary in order to meet population equality, compactness or to minimize split jurisdictions since the Revised Holt Plan shows this can be done without such non-contiguous legislative boundaries. Critically, the Revised Holt Plan demonstrates that there is no conflict between reducing splits and maintaining contiguity. The LRC has failed to produce any justification for not addressing the mandate of this Court to improve on the contiguity of its rejected prior plan.

4. THE VRA DOES NOT JUSTIFY ANY OF THE LRC’S SECTION 16 VIOLATIONS

The LRC does not, and cannot, aver that any of the excessive divisions, or non-compact and non-contiguous districts, created under the Revised LRC Plan are required to comply with the terms of the VRA. In its Answer, the LRC merely states that the Revised LRC Plan “maintains all four Senate majority-minority districts,” (Ans. ¶ 74), and that the Plan “fully

complies with the [VRA] and creates majority-minority districts where warranted under federal law,” (*id.* ¶ 75). These statements are demonstrably incorrect,¹¹ and in any event, they miss the point of Petitioners’ challenge. Whether or not the LRC can adequately support a claim that its plan complies with the terms of the VRA, it must also comply with the requirements of the Pennsylvania Constitution. Critically, the LRC does not contend that any splits or fractures under the Revised LRC Plan are attributable to its purported attempts to comply with the VRA. Nor does it contend that compliance with the VRA creates any of the compactness or contiguity issues outlined in the Petition. Indeed, the LRC could not credibly make such claims, as the Revised Holt Plan shows that the magnitude of splits and fractures can be dramatically reduced, with improved compactness and contiguity, while still preserving the four majority-minority Senate districts, and creating as many as four additional majority-minority districts in the House (*id.* ¶ 76)¹².

E. THE COURT SHOULD DIRECT THE LRC TO REAPPORTION THE COMMONWEALTH CONSISTENT WITH THE REVISED HOLT PLAN

The LRC has had two opportunities to adopt a plan that complies with the requirements of the Constitution and has now twice failed to do so. On remand, Petitioner Holt presented the LRC with the Revised Holt Plan (as well as two variations on that plan), which created 339 fewer subdivision fractures in the House and 56 fewer subdivision fractures in the Senate than the Revised LRC Plan. The LRC was thus well aware of a clear alternative plan for drawing particular district lines while easily avoiding the constitutional pitfalls that doomed the Original LRC Plan. But the LRC refused, without valid reason, to adopt a plan that complied with the

¹¹ As to the Senate districts in particular, the LRC maintains that two of these four districts meet the VRA standard of 50% + 1 of the over 18 population (*Bartlett v. Strickland*, 129 S.Ct. 1231 (2009)), only because the LRC’s calculations improperly double-count the “Hispanic white” and the “Hispanic black” population as both Hispanic and either white or black. When these populations are properly included only in the Hispanic count, both SD 4 and SD 7 fall just below the *Bartlett* standard for majority-minority districts. See Petition ¶ 74.

¹² The LRC does not deny that the Revised Holt Plan creates additional majority-minority districts in the House.

Constitution. Indeed, the available record demonstrates that the LRC relied on an erroneous belief that marginal (if any) improvement over the rejected Original LRC Plan should be enough, and that it declined on remand to make meaningful adjustments to correct the overwhelming shortfalls based on clearly impermissible considerations.

When confronted with such persistent failure on the part of a legislative body to adopt a constitutionally valid apportionment after remand of a prior invalid plan, this Court is left with the “task of fashioning such affirmative relief as would be necessary to ensure a constitutionally valid legislative apportionment. . . .” *Butcher v. Bloom*, 420 Pa. 305, 216 A.2d 457, 459 (1966).. Petitioners recognize that the LRC retains “considerable discretion in fashioning a plan that comports with all constitutional requirements.” *Holt I*, 38 A.3d at 761. For that reason, Petitioners do not contend that the LRC should be constrained to select any particular plan or drawing any specific lines on a reapportionment map.

That said, the LRC has demonstrated that it is incapable or unwilling to exercise what it apparently views as unfettered discretion in a manner that yields a constitutionally compliant plan. Moreover, while the Court has recognized the LRC’s discretion in determining where to draw each line, it also recognized that the *Holt I* plan “proves the point” that “computer technology” is an available method to arrive at “acceptable levels of population deviation without doing unnecessary violence to other constitutional commands.” *Id.* at 760. The LRC has twice decided, without reason, to ignore readily available methods to eliminate subdivision splits and fractures that are not “absolutely necessary.”

Therefore, in order to ensure that the LRC will adopt a plan that complies with the mandates of the Constitution, and in order to avoid the needless burdens of repeated remands and appeals to this Court, Petitioners respectfully request that the LRC be instructed on further

remand to it adopt a plan that contains no more political subdivision splits or fractures than the number of splits and fractures made under the Revised Holt Plan.

IX. CONCLUSION

A mere six months ago, this Court reaffirmed the LRC's obligations under the Pennsylvania Constitution, providing clear and forceful direction that the LRC reapportion the Commonwealth in a manner that complies with the unambiguous mandates of Article II, Section 16. Those constitutional mandates are no less clear, forceful or necessary to protecting the voting rights of the citizens of this Commonwealth than they were when the Court issued its decision in *Holt I*. Yet, the LRC persists in its attempt to divide up Commonwealth counties, municipalities and wards more than twice as often as is "absolutely necessary." Petitioners therefore come before this Court a second time to ask that it not permit the LRC to ignore the language of the Constitution and this Court's precedent. To ensure that this language will have continued effect in protecting the rights of Pennsylvania's citizens, the Revised LRC Plan must be invalidated and remanded to the LRC with instructions to develop a plan that creates no more political subdivision splits or fractures than the number of splits and fractures made under the Revised Holt Plan.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David N", with a long horizontal flourish extending to the right.

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Dated: August 6, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of August, 2012, I caused a true and correct copy of the foregoing Brief of Petitioners and all supporting documents to be served via electronic mail pursuant to the Court's Order on the following:

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