

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA
PARRILLA; REBECCA
POYOUROWN; WILLIAM TUNG;
ROSEANNE MILAZZO; BURT
SIEGEL; SUSAN CASSANELLI;
LEE CASSANELLI; LYNN
WACHMAN; MICHAEL
GUTTMAN; MAYA FONKEU;
BRADY HILL; MARY ELLEN
BALCHUNIS; TOM DEWALL;
STEPHANIE MCNULTY; and JANET
TEMIN,

Petitioners,

v.

CASES CONSOLIDATED

No. 464 M.D. 2021

LEIGH M. CHAPMAN, in
her official capacity as the Acting
Secretary of the Commonwealth of
Pennsylvania; JESSICA MATHIS, in
her official capacity for the
Pennsylvania Bureau of Election
Services and Notaries,

Respondents.

PHILIP T. GRESSMAN; RON Y.
DONAGI; KRISTOPHER R. TAPP;
PAMELA GORKIN; DAVID P.
MARSH; JAMES L.
ROSENBERGER; AMY MYERS;
EUGENE BOMAN; GARY
GORDON; LIZ MCMAHON,
TIMOTHY G. FEEMAN; and GARTH
ISAAK,

Petitioners,

LEIGH M. CHAPMAN, in
her official capacity as the Acting
Secretary of the Commonwealth of
Pennsylvania; JESSICA MATHIS, in
her official capacity as Director for the
Pennsylvania Bureau of Election
Services and Notaries,

Respondents.

**POST TRIAL SUBMISSION/BRIEF OF INTERVENOR,
REPRESENTATIVE JOANNA E. MCCLINTON, LEADER OF THE
DEMOCRATIC CAUCUS OF THE PENNSYLVANIA HOUSE OF
REPRESENTATIVES**

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I. INTRODUCTION

This matter, the first of its kind to be decided after the decision of the Supreme Court of Pennsylvania in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (“*LWV*”) and the first time since that decision that any court is called upon to apply the factors set forth therein following the decennial United States Census. This relatively small difference in procedural posture of this case, has a tremendous effect not only upon the proceedings before this Court which occurred on January 27 and 28, 2022, but also how this Court should evaluate the proposed redistricting plans, all of which fall within a range of constitutional reasonableness.

As one would have expected the “trial” or “hearing” of this matter was overwhelmingly dominated by testimony of various mathematical, statistical, redistricting, and political experts. The primary focus of the testimony, and indeed the evidence in general, was an attempt to prove “statistically” which redistricting plan was the “best,” based upon those neutral factors identified in *LWV*, *to wit*, whether the proposed congressional districts created under a redistricting plan are:

composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.

Id. at 816-17. Nevertheless, the *LWV* Court recognized that those “neutral criteria”: “provide a ‘floor’ of protection for an individual against the dilution of his or her vote in the creation of such districts.” *Id.* at 817. All agree with that proposition, in fact,

Attorney Voss, one of the learned counsel for the Republican Congressional Intervenors likened meeting these “neutral criteria” as merely the “entry fee” necessary to have the Court even consider a party’s map. Whether one calls it an “entry fee,” a “threshold,” or the “floor,” the proposition that, to even be seriously considered, a plan must meet a certain minimum statistical threshold is now unquestionably part of the law of Pennsylvania (to the extent it was not before *LWV*).

But all of those metrics beg the ultimate question: if all redistricting plans presented meet the threshold statistical requirement and have thus, “paid their entry fees,” how does the Court decide between one of more than a dozen “fee paying plans”?

Representative Joanna E. McClinton, Leader of the Democratic Caucus of the Pennsylvania House of Representatives (“House Democratic Caucus Intervenor” or “Representative McClinton”), attempts to answer that question below. Like all other parties, Representative McClinton believes that the House Democratic Caucus Intervenor’s Plan is the best, but not because the plan merely meets and exceeds some statistical threshold, but because it meets and exceeds those criteria and attempts to respect the political history of the Commonwealth of Pennsylvania from 1966 through the present day.

II. FACTUAL AND PROCEDURAL BACKGROUND

There are virtually no material facts in dispute between the parties. Both the Joint Stipulation of Facts and the testimony over the last two days demonstrates as much. Accordingly, the House Democratic Caucus Intervenor incorporates herein by

reference the factual and procedural recitations set forth in its previously filed January 24, 2022, Brief in Support of its Redistricting Plan and its January 27, 2022 Trial Brief, as if fully set forth at length herein.

III. JURISDICTION

As described in its Trial Brief at section III.A and stated in its opening statement before the Court, both of which are incorporated by reference herein as if fully set forth at length below, the House Democratic Caucus Intervenor does not believe that this Court does not possess the requisite jurisdiction, power, or authority to select a redistricting plan and thereafter issue and order and final judgment in favor of any party herein. To the contrary, House Democratic Caucus Intervenor believes that this Court may present its findings and issue a report and recommendation regarding which plan it believes to be the preferred plan in the form of a “report and recommendation,” as was previously done in both *LWV* and *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992).

IV. ARGUMENT

A. Historical Perspective

In the years leading up to the 2018 *LWV* from 1966 – 2010, Pennsylvania’s Congressional delegation ranged in amount between 19 – 27 members of congress being elected from Pennsylvania. *Id.* at 762-763 (Table 1). Accordingly, Pennsylvania’s congressional delegation during that time averaged approximately 23 (22.65%) members. During that same time the number of Democrats elected to congress averaged 12.35 members per election cycle and the number of Republicans averaged

12.30 members per election cycle. Translated into percentages, what that means is that from 1966 – 2010 of the total 521 representatives elected to the United States House of Representatives from Pennsylvania, 54.5% were Democrats and 54.39% were Republicans. Simply put, given the varying number of representatives apportioned to the Commonwealth during that 44 year period, were almost evenly split.¹

In 2011, after the 2010 census, Pennsylvania's number of apportioned member to the House of Representatives was diminished by 1, from 19 to 18. As a result, the Pennsylvania General Assembly adopted Pennsylvania Congressional Redistricting Act of 2011, which was signed into law by then Governor Corbett. The result of that plan was that from its first use in the 2012 election through its last use in 2016, the 18 members of the United States Congress sent from Pennsylvania amounted 5 Democrats and 13 Republicans, in every one of those elections. Accordingly, during that four year period of time the average number of Democrats elected to the House of Representatives was diminished to 27.77% and the number of Republicans elected to the House of Representatives was increased to 72.23%. *Id.* at 765 (Table 2).²

Having lost only one seat due to the 2012 decennial census, the total average number of representatives for the first four years of the use of the 2011 plan resulted in a net loss of 26.73% of the seats historically (since 1966) won by Democrats and an

¹ These percentages were calculated simply by averaging the numbers extant on table 1 in the *LWV* opinion.

² These percentages were calculated simply by averaging the numbers extant on table 1 in the *LWV* opinion.

increase of 17.84% of the seats historically (since 1966) won by Republicans. *Id.* Accordingly, in 2018, the Supreme Court of Pennsylvania implemented a remedial redistricting plan which resulted in a 9-9 split of Pennsylvania's seats in the House of Representatives for that year and again in 2020. As a result, the 2018 remedial plan restored the previous 44 year balanced historical partisan distribution Pennsylvania's congressional districts. *Id.*

What these statistics actual election results make clear is that there is no historical or typical "Republican tilt" to drawing congressional districts in Pennsylvania. To the contrary, while there years where one party or another enjoyed more seats than the other in the House of Representatives between 1966 – 2010, the plan itself was never solely responsible for the results of any particular election during that 44 year period. *Id.* at Table 1. It was only the 2011 plan that firmly established a lopsided Republican advantage in Pennsylvania's partisan distribution of members of the House of Representatives.

B. 2022 and Beyond

The two days of testimony in this matter focused on the technical details of redistricting and minute differences between the maps that have been submitted has been used to obscure the larger points at issue in this case. None of the proposed plans are as egregiously gerrymandered as the 2011 Plan. All of the parties' maps fall within an acceptable statistical range with regard to the neutral criteria set forth in *LWV*. Yet none of the maps (except that of the House Democratic Intervenor) considers the 44

year history of Pennsylvania's congressional delegation (from 1966 – 2010), as well as the 4 year history of that same delegation since 2018, nor do the other plans consider the fact that between 2011 and the present registered Democratic voters outnumber Republicans by a range of 500,000 – 1,100,000 depending upon the year. Regardless of the amount of the Democratic voter registration advantage, there can be no doubt that such advantage has existed since at least 2011.

In *LWV*, the Supreme Court of Pennsylvania, did not suggest that the judicial process for determining what plan to implement was the one that came the closest to statistical perfection regarding the “neutral criteria.” To the contrary, in *LWV*, the Supreme Court recognized that:

Specifically, partisan gerrymandering dilutes the votes of those who in prior elections voted for the party not in power to give the party in power a lasting electoral advantage. By placing voters preferring one party's candidates in districts where their votes are wasted on candidates likely to lose (cracking), or by placing such voters in districts where their votes are cast for candidates destined to win (packing), the non-favored party's votes are diluted. It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation. This is the antithesis of a healthy representative democracy. Indeed, for our form of government to operate as intended, each and every Pennsylvania voter must have the same free and equal opportunity to select his or her representatives.

Id. at 814. Furthermore, the *LWV* Court itself specifically predicted and provided for a situation, where, as here, a plan or plans, might statistically meet the “neutral criteria” but a future Court, might still find that even a statistically perfect plan does not comply with the Free and Equal Elections Clause of the Pennsylvania Constitution. Pa. Const.

art. I, § 5. In clairvoyantly predicting the not to distant future from 2018, Justice Todd writing for the Supreme Court in *LWV* found:

However, this is not the exclusive means by which a violation of Article I, Section 5 may be established. As we have repeatedly emphasized throughout our discussion, the overarching objective of this provision of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens. We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral "floor" criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative. *See* N.T. Trial, 12/13/17, at 839-42 (Dr. Warshaw discussing the concept of an efficiency gap based on the number of "wasted" votes for the minority political party under a particular redistricting plan).

Id. at 817. Unfortunately, the *LWV* Court was not required to consider the issue presented in this case because as that Court concluded: "However, as the case at bar may be resolved solely on the basis of consideration of the degree to which neutral criteria were subordinated to the pursuit of partisan political advantage, as discussed below, we need not address at this juncture the possibility of such future claims.¹⁷" *Id.* (Footnote omitted).

C. Analysis and Application to Current Proposed Plans

As a preliminary matter, the House Democratic Intervenor reasserts its objection the claim of the Republican House and Senate Intervenor that the now vetoed plan found in HB2146 deserves any deference or special treatment from this Court because

it represents the “will of the people of the Commonwealth of Pennsylvania.” As stated in the Trial Brief of the House Democratic Intervenor at section III.B, which is incorporated by reference herein, as fully as though set forth herein at length.

By comparison to the present case, the *LWV* was not nearly as challenging. Since the 2011 Plan was so obviously violative of the “neutral criteria” as to be unconstitutional under Pennsylvania’s Free and Equal Elections Clause, not to mention that in practice over three separate election cycles it produced such lopsided results compared to the 23 election cycles that preceded it, the task of declaring that plan unconstitutional and thereafter implementing a remedial plan which restored parity to the partisan distribution of members Pennsylvania’s Congressional delegation now seems relatively “easy.” By contrast, the present case does not require this Court to declare any currently in force plan unconstitutional, everyone agrees the 2018 remedial plan is now unconstitutionally obsolete by virtue of the 2020 census. The only issue then is which new plan to pick.

That task is not simple. As the experts all agreed in one way or another, each of these plans meet all of the neutral criteria within such a narrow band of deviation, they could all be deemed reasonable. So, the question still remains, what should be the tiebreaking factor.

The House Democratic Caucus Intervenor suggests that there is no one factor that can be used to “break the tie.” Instead, a plan which comports with the historical partisan distribution of members of Pennsylvania’s congressional delegation (excluding

those years that the unconstitutional 2011 Plan was in place), together with some consideration of the overall partisan identification of the voters in the Commonwealth, is the fairest way to “break” the tie between these otherwise equal maps. When the results from 1966-2010 are added in with the results from 2018-2021, the total number of representatives elected to congress from Pennsylvania amounts to 557. Expressed as a percentage of those elected, approximately 54% (54.21%) were Democrats and approximately 46% (45.78%) were Republicans. Accordingly, carrying that 48 year, 25 election cycle history forward and applying it to the current 17 seats apportioned to Pennsylvania for 2022 that would result in 9 (9.17) Democratic representatives and 8 (7.82) Republicans elected.

An analysis of the House Democratic Caucus Intervenor’s Plan by the “Dave’s Redistricting” Website, reveals that of the 17 congressional districts in the Plan, 8 would be safely or lean Democratic, 6 would be safely or lean Republican and the remaining 3 districts would result in competitive or otherwise unpredictable district outcomes as between the two parties. *See* <https://davesredistricting.org/maps#stats::95238e8e-6273-480a-bb5e-ee0dd7b122d5> (last visited Jan. 29, 2022). With 3 competitive or otherwise unpredictable districts, the outcomes could range anywhere from 11 Democratic seats to 6 Republican seats; to 9 Republican seats and 8 Democratic seats. Both of those outcomes are at the extreme of the results, but either one would comport with the results of the 25 previous election cycles (again excluding only those cycles where elections were held under the unconstitutional 2011 Plan).

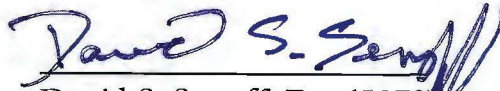
Accordingly, having paid its “entry fee,”³ the Representative McClinton as Intervenor respectfully suggests to this Court that it is the House Democratic Caucus Intervenor’s Plan which is the only plan that meets the “neutral criteria” and is respectful of the historical partisan distribution of congressional representatives dating back to 1966 as well as the only plan that respects and reflects the Democratic voter registration of between 500,000 – 1,100,000 Pennsylvanians registered to vote in this Commonwealth from 2011 to the present.

V. CONCLUSION

For all the foregoing reasons, Intervenor Representative Joanna E. McClinton, Leader of the Democratic Caucus of the Pennsylvania House of Representatives, respectfully requests that this Honorable Court issue its remedy in the form of a recommendation to the Supreme Court of Pennsylvania and that in considering the various proposed redistricting plans, that this Court not give deference to nor any special consideration of any plan which has previously been passed by a simple majority of the General Assembly, vetoed by the Governor and otherwise not enacted into law. Similarly, Intervenor respectfully requests that this Honorable Court not give any difference to nor special treatment of any proposed redistricting plan submitted by an allegedly “majority” of the members of the General Assembly.

³ House Democratic Intervenor incorporates by reference herein its January 24, 2022, Brief in support of its Proposed Redistricting Plan, as fully as though herein set forth at length with regard to the data and support that its plan does, in fact, meet the *LWV* neutral criteria.

Respectfully submitted,



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Dated: January 29, 2022

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief contains 2920 words. In making this certification, I have relied upon the word count function of the word-processing system used to prepare this Brief.

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

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