[J-71-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JOANN ERFER and JEFFREY B. ALBERT,	:	14 MM 2002
	:	
	:	Application for Relief Pursuant to Section
Petitioners	:	726 of the Judicial Code.
	:	
	:	
v.	:	
	:	
THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, in his official capacity as Governor of Pennsylvania; KIM PIZZINGRILLI, in her official capacity as Secretary of the Commonwealth of Pennsylvania; RICHARD FILLING, in his official capacity as Commissioner of the Bureau of Commissions, Elections, and Legislation of the Pennsylvania Department of State; ROBERT C. JUBELIRER, in his official capacity as Lieutenant Governor of Pennsylvania and President of the Pennsylvania Senate; MATTHEW J. RYAN, in his official capacity as Speaker of the Pennsylvania House of Representatives,	:	
	:	
Respondents	:	

OPINION

MR. JUSTICE CAPPY **Filed: March 15, 2002**

This opinion is filed in support of the per curiam order of this court dated February 15, 2002. That order dismissed the state constitutional law claims raised in Joann Erfer and Jeffrey Albert's Petition for Review.

This matter concerns the General Assembly's plan redrawing federal congressional districts to comport with the results of the 2000 Census. See Act No. 2002-1 ("Act 1"). Joann Erfer and Jeffrey Albert ("Petitioners") filed a Petition for Review with the Commonwealth Court on January 10, 2002, raising federal and state constitutional law challenges to Act 1. In light of the fact that February 19, 2002 is the opening date and March 12, 2002 is the closing date for the circulation and filing of nomination petitions for the 2002 elections, Petitioners also requested that the Commonwealth Court expedite its consideration of this matter.

On January 22, 2002, the Commonwealth Court, however, scheduled to hear this matter on March 13, 2002, one day after the closing date for the circulation and filing of nomination petitions. On January 25, 2002, Petitioners filed an emergency Application with this court, requesting that we exercise plenary jurisdiction over this matter and set an expedited hearing schedule. Notably, they requested that only their Pennsylvania Constitutional law claims be resolved on an expedited basis. We granted plenary jurisdiction and remanded this matter with the directive that the Commonwealth Court's findings of fact and conclusions of law should be filed with this court by February 8, 2002.

The Honorable Dante Pellegrini of the Commonwealth Court promptly held hearings in this matter. While Petitioners raised several state constitutional law claims, they focused primarily on their claim that the legislature engaged in unconstitutional political gerrymandering in drawing up Act 1 in violation of the equal protection guarantee, Pa. Const. art. 1, §§ 1 and 26, and the free and equal elections clause, Pa. Const. art. 1, § 5. Petitioners acknowledged that based on voter registration figures, Act 1 grants rough parity to the two dominant political parties. See Pellegrini's Recommended Findings of Fact and Conclusions of Law, dated February 8, 2002, (hereinafter "Pellegrini Opinion") at 12-13

(discussing statistics related to voter registration in the nineteen districts).[1] Thus, based solely on voter registration, there was no evidence of political gerrymandering. Yet, Petitioners did not contend that the evidence of gerrymandering could be found based upon the registration of the voters. Rather, they claimed that based upon the statistics of how voters actually cast their ballots in the past, the complexion of the districts was such that a Republican candidate would win in 13 or 14 of the 19 districts.

Judge Pellegrini agreed with Petitioners that roughly two-thirds of the districts would probably be won by Republicans, and that the legislature took the information it gleaned from analyzing voting trends and deliberately drew the congressional districts so as to grant an advantage to the Republican party. See Pellegrini Opinion at 16 and 27. Yet, Judge Pellegrini opined that Petitioners could not prevail on their gerrymandering claim, and were thus not entitled to relief, because Petitioners did not constitute an "identifiable political salient class". Pellegrini Opinion at 27.[2] The parties were then directed to file briefs with this court.

As we exercised plenary jurisdiction over this matter, but did not relinquish our jurisdiction when we ordered Judge Pellegrini to hold hearings and issue a report, our review of the Pellegrini Opinion is de novo. Annenberg v. Commonwealth, 757 A.2d 338, 343 (Pa. 2000). Yet, we note that "when addressing the findings of fact made by [Judge Pellegrini], although such findings are not binding on us, we will afford them due

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[1] The Pellegrini Opinion is attached at Appendix A.

[2] Petitioners also apparently pursued a state constitutional "one person, one vote" claim before Judge Pellegrini. See Pellegrini Opinion at 25. They also raised state constitutional law claims asserting an abridgement of their rights to free speech and free assembly. See Pa.Const. art. 1, §§ 7 and 20. Judge Pellegrini concluded that Petitioners were not entitled to relief on these claims. See Pellegrini Opinion at 25, 27-28. In their brief to this court, Petitioners fail to pursue these claims. Thus, they will not be considered by this court.

consideration, as the jurist who presided over the hearings was in the best position to determine the facts. " Id.

At the outset, we must address the claim raised by Lieutenant Governor/President Pro Tem of the Senate Jubelirer and Speaker Ryan (collectively, "the Presiding Officers") that Petitioners do not have standing to pursue this matter. The Presiding Officers raised this issue below via preliminary objections and Judge Pellegrini opted not to address it. Pellegrini Opinion at 20. They raise two major arguments in support of their position

First, the Presiding Officers contend that Petitioners cannot attack the constitutionality of the reapportionment plan as a whole. Rather, the Presiding Officers claim that Petitioners have standing to attack the constitutionality of Act 1 only as it relates to their districts, and may not challenge Act 1 with regard to how it draws the lines for other districts in this Commonwealth. In support of this claim, they rely heavily on the U.S. Supreme Court's decision in United States v. Hays, 515 U.S. 737 (1995).

Regardless of whether the Presiding Officers have correctly divined the holding of Hays as it relates to a determination of standing in matters commenced in federal court, it does not control our resolution of the standing issue. The U.S. Supreme Court has unequivocally declared that "state courts are not bound to adhere to federal standing requirements . . . ." ASARCO Inc. v. Kadish, 109 S. Ct. 2037, 2045 (1989). The high Court recognized that in resolving issues of standing, state courts are not constrained by the dictates of Article III of the United States Constitution. Id. Thus, Hays does not control the outcome of this issue.

This court has not squarely addressed whether a litigant challenging a plan reapportioning congressional districts may attack the entirety of the plan, or is relegated to complaining about merely the district in which he lives. This gap, however, may be filled by applying our general rule of standing to this matter. We have stated that a party has standing where that party is "aggrieved". In re T.J., 739 A.2d 478, 481 (Pa. 1999). "For a

party to be aggrieved, it must have: 1) a substantial interest in the subject matter of the litigation; 2) the party's interest must be direct; and, 3) the interest must be immediate and not a remote consequence of the action." Id. (citations and internal quotation marks omitted).

The Presiding Officers would have us declare that a litigant challenging a reapportionment plan can have a substantial, direct, and immediate interest in only that portion of the plan which drew the lines for his particular district. We believe such a narrow interpretation to be discordant with the reality of challenging a reapportionment scheme. In mounting such an attack, a litigant cannot logically confine his challenge to his particular district. A reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole. An allegation that a litigant's district was improperly gerrymandered necessarily involves a critique of the plan beyond the borders of his district. Thus, we decline to find that a litigant challenging a reapportionment scheme must confine his attack to the drawing of the lines of his own district.

The Presiding Officers also make a brief argument that political gerrymandering claims may be raised only by the Pennsylvania State Democratic Committee ("Democratic Committee") and not by individual voters.

The Presiding Officers have unwittingly presented an argument that is the mirror-opposite of what we have recently declared to be the law of standing in reapportionment matters. Shortly after the Presiding Officers filed their brief in this matter, we declared that "any entity not authorized by law to exercise the right to vote in this Commonwealth lacks standing to challenge the reapportionment plan." Albert v. 2001 Legislative Reapportionment Comm'n, 2002 WL 241297, * 3 (Pa. Feb. 15, 2002). This conclusion was compelled by the fact that it is "the right to vote and the right to have one's vote counted that is the subject matter of a reapportionment challenge . . . ." Id. Clearly, a political committee does not have the right, in and of itself, to vote. Thus, contrary to the Presiding

Officers' contention, the Democratic Committee (or its leaders acting in their official capacities) are not the only entities that could have standing in this challenge; in fact, the Democratic Committee is specifically denied standing to assert such a challenge.[3] We therefore reject this argument.

The Presiding Officers assert that even if Petitioners are the proper parties to bring this challenge, we should still dismiss the matter without examining the merits. They contend that none of the protections afforded by the Pennsylvania Constitution may be extended to congressional elections; rather, they claim that the only applicable constitutional provisions are contained in the U.S. Constitution. In support of this contention, they note that the United States Constitution has given the state legislatures the power to draw congressional reapportionment plans. See U.S. Const. art. I, § 4, cl. 1. Thus, they conclude, as the legislature's power to effect a congressional reapportionment derives from the U.S. Constitution, then the Pennsylvania Constitution is inapplicable to a congressional reapportionment plan. They argue that we should thus deny Petitioners relief without examining the substance of the state constitutional law claims.

It is true that the U.S. Constitution has granted our legislature the power to craft congressional reapportionment plans. Yet, we see no indication that such a grant of power

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[3] The Presiding Officers also briefly assert that Petitioners are unable to pursue this matter as they never adduced any evidence that Petitioners even exist, and thus Petitioners are no more than straw litigants. This argument must be rejected. The record reveals that Petitioners appended signed verifications that the averments contained in their Petition for Review are true and correct; these averments contain allegations that they are registered Democrats residing within Pennsylvania. Thus, we cannot accept the Presiding Officers' argument that Petitioners lack standing as there is no evidence that they exist.

Furthermore, to the extent that these verifications would be deemed insufficient to establish Petitioners' existence, a remand to Judge Pellegrini to hold a hearing on this limited issue would be a waste of judicial resources as we have determined that Petitioners are not entitled to relief on the substance of their state constitutional law claims.

simultaneously suspended the constitution of our Commonwealth vis-à-vis congressional reapportionment. Without clear support for the radical conclusion that our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to so circumscribe the operation of the organic legal document of our Commonwealth. We therefore reject this argument.

The Presiding Officers also make a fleeting argument that the free and equal elections clause, Pa. Const. art. 1, § 5, applies only in elections for offices of the Commonwealth. As the position of representative to the United States Congress is not an office of the Commonwealth, they reason, then this provision has no application to congressional elections. We reject this argument as nothing in the plain language of the free and equal elections clause limits it to elections for Commonwealth officials.

Having determined for the purposes of our review that Petitioners have standing and that the Pennsylvania Constitution applies to congressional reapportionment plans, we may now turn to the substance of Petitioners' challenge. The crux of this dispute is whether Petitioners have established that Act 1 constitutes unconstitutional political gerrymandering in violation of the equal protection guarantee, Pa. Const. art. 1, §§ 1 and 26, and the free and equal elections clause, Pa. Const. art. 1, § 5. As with any legislative enactment, Act 1 enjoys a presumption of constitutionality. Commonwealth v. Means, 773 A.2d 143, 147 (Pa. 2001). A plaintiff bears a heavy burden to prove it unconstitutional. "A statute will only be declared unconstitutional if it clearly, palpably and plainly violates the constitution." Id. (citations omitted).

This court did not always recognize that a claim of political gerrymandering was cognizable under the Pennsylvania Constitution. See Newbold v. Osser, 250 A.2d 54 (Pa. 1967). This court changed tack, however, in our unanimous decision In re 1991 Reapportionment, 609 A.2d 132 (Pa. 1992), and recognized that a litigant could raise claims that a reapportionment plan effected a political gerrymander and thus violated the

U.S. and Pennsylvania Constitutions. This new view on the justiciability of political gerrymandering claims was predicated on the U. S. Supreme Court's decision in Davis v. Bandemer, 478 U.S. 109 (1986), wherein the Court held that such claims were cognizable as a violation of the Equal Protection Clause.

Once having determined that the claim was justiciable, the next task for the 1991 Reapportionment court was to define the contours of the test for determining whether unconstitutional political gerrymandering had occurred. Unfortunately, a majority of the Bandemer Court was unable to agree on the parameters of such a test. While the Bandemer Court issued no holding on this point, the 1991 Reapportionment court opted to follow the test set forth by the Bandemer plurality. The 1991 Reapportionment court then proceeded to utilize the test set forth by the Bandemer plurality to resolve both federal and state constitutional political gerrymandering claims.

In resolving Petitioners' claim that Act 1 is a political gerrymander in violation of the Pennsylvania Constitution, we will continue the precedent enunciated in 1991 Reapportionment and apply the test set forth by the Bandemer plurality. We reject Petitioners' arguments that we should declare that the right to vote guaranteed by our Commonwealth's Constitution provides broader protections than those guaranteed by the federal Equal Protection Clause. We come to this conclusion for two reasons. First, to the extent that Petitioners' gerrymandering claim is predicated on the equal protection guarantee contained in Pa. Const. art. 1, §§ 1 and 26, this court has previously determined that this right is coterminous with its federal counterpart. Love v. Borough of Stroudsburg, 597 A.2d 1137 (Pa. 1991). Second, we reject Petitioners' claim that the Pennsylvania Constitution's free and equal elections clause provides further protection to the right to vote than does the Equal Protection Clause. Petitioners provide us with no persuasive argument as to why we should, at this juncture, interpret our constitution in such a fashion

that the right to vote is more expansive than the guarantee found in the federal constitution. See generally Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991).

While we continue to adhere to the view that the disposition of political gerrymandering claims should be controlled by the Bandemer plurality, we are also fully cognizant of the fact the plurality's opinion has bedeviled both commentators and courts, obscuring via its labrynthian twists and turns of logic the precise nature of the standard to be employed. See, e.g., Michael E. Lewyn, How to Limit Gerrymandering, 45 Fl. Law Rev. 403, 443 (1993) (The Bandemer plurality has "confounded legislators, practitioners, and academics alike. Some find the case internally incoherent; others find a method to the madness." (internal quotation marks and citation omitted)). Yet, we find that by carefully parsing out the plurality's language, we can arrive at a simple (although decidedly not simplistic) recitation of the test. Distilled to its essence, the plurality's test states that a plaintiff raising a gerrymandering claim must establish that there was intentional discrimination against an identifiable political group and that there was an actual discriminatory effect on that group. Bandemer, 478 U.S. at 127. In establishing that there has been a discriminatory effect, the plaintiff must show two things: first, he must show that the identifiable group has been, or is projected to be, disadvantaged at the polls; second, he must establish that by being disadvantaged at the polls, the identifiable group will "lack . . . political power and [be denied] fair representation." Id. at 139 (hereinafter referred to as the "effects test").

The first determination we must make is whether Petitioners have shown that the legislature in crafting Act 1 intentionally discriminated against an identifiable political group. The Bandemer plurality candidly recognized that in most instances, intentional discrimination would not be difficult to show since "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." Bandemer, 478 U.S. at 129. In the matter sub judice,

Judge Pellegrini found that the legislature deliberately drew the congressional districts so as to grant an advantage to the Republican party and thus concluded that there was a discriminatory intent. See Pellegrini Opinion at 16 and 27. We see no basis to reject this conclusion.

Judge Pellegrini was not persuaded, however, that Petitioners had shown that citizens who vote Democratic (but are not necessarily registered Democrats) are an identifiable political group. He contended that Petitioners should be denied relief because they had failed to show that "[v]oters who are likely to vote Democratic (or Republican) in a particular district though not registered Democrats (or Republicans) based on the candidates or issues" are an identifiable political group. Pellegrini Opinion at 27.

We cannot agree with such a sweeping conclusion. While we are uncertain whether Petitioners' evidence established that there is an identifiable political class of citizens who vote for Democratic congressional candidates, we also find it to be imprudent to state, as a blanket proposition, that future plaintiffs could never adduce sufficient evidence to establish that such an identifiable class exists. We surmise that, particularly since the field of information technology is advancing at a breakneck speed, such a showing could be made by future challengers. However, it is not incumbent upon us to resolve this thorny issue as Petitioners' claim falters on another basis. Thus, in this matter, we will assume without deciding that Petitioners have shown the existence of an identifiable political group.

The finding that there was an intent to discriminate and the assumption that Petitioners have shown the existence of an identifiable political class allows Petitioners to clear only the first hurdle of the test set forth by the Bandemer plurality. In order to show that there has been unconstitutional political gerrymandering, Petitioners must also show that the reapportionment plan works "an actual discriminatory effect . . . ." Bandemer, 478 U.S. at 127. As noted supra, the plaintiff must prove two things in order to establish an actual discriminatory effect. First, he must show that the reapportionment plan works

disproportionate results at the polls; this can be accomplished via actual election results or by projected outcomes of future elections. Id. at 139. Second, he must adduce evidence indicating a "strong indicia of lack of political power and the denial of fair representation." Id. To meet this second prong of the effects test, the discriminated against group must show that it has "essentially been shut out of the political process." Id. See also Pope v. Blue, 809 F.Supp. 392 (W.D.N.C. 1992); Badham v. Eu, 694 F.Supp. 664 (N.D. Cal. 1988) (discussing the two prongs of the Bandemer plurality's actual discriminatory effects test).

We emphasize that the effects test is conjunctive in nature, and that both showings of an actual discriminatory effect must be made. The plurality explicitly stated that "a group's electoral power is not unconstitutionally diminished by the simple fact of an apportionment scheme that makes winning elections more difficult, and a failure of proportional representation alone does not constitute impermissible discrimination under the Equal Protection Clause." Bandemer, 478 U.S. at 132 (citations omitted). The Bandemer plurality supported this conclusion by reasoning that "[a]n individual or group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters." Id.

This is unquestionably an onerous standard, difficult for a plaintiff to meet. Yet it was not unwittingly crafted. The Bandemer plurality, aware that it was treading on ground that the judiciary had previously declared forbidden to itself, was chary about creating a test that would allow for officious interference with the state legislatures' prerogative to create reapportionment plans. While the Bandemer plurality gave notice to the state legislatures that they would no longer be free to construct political gerrymanders with impunity, it recognized that reapportionment is "the most political of legislative functions," one not

amenable to judicial control or correction save for the most egregious abuses of that power. Id. at 143.[4]

In the matter sub judice, Petitioners adduced evidence showing that the number of congressional seats that Republicans are projected to win will be disproportionate to the percentage of the vote Republicans are anticipated to receive statewide. Even if we assume arguendo that this evidence establishes that Act 1 will effect disproportionate election results,[5] Petitioners are nonetheless not entitled to relief as they have not shown that there is a "strong indicia of lack of political power and the denial of fair representation." See Bandemer, 478 U.S. at 139. As stated supra, this prong of the effects test requires a plaintiff to establish that the discriminated against group has effectively been shut out of the political process. Petitioners have failed to meet this burden. First, they have not alleged in their brief to this court that a winning Republican congressional candidate "will entirely ignore the interests" of those citizens within his district who voted for the Democratic candidate. See Bandemer, 478 U.S. at 132. Also, it is undisputed that at least five of the

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[4] In this court's recent decision regarding challenges to reapportionment of the Pennsylvania Legislature, three Justices expressed receptiveness to the concern that the Court should not occupy an unduly passive role in the vindication of express state constitutional requirements of compactness and integrity of political subdivisions. See Albert v. 2001 Legislative Reapportionment Comm'n, ___ A.2d ___, ___, 2002 WL 241297 (Pa. Feb. 15, 2002) (Saylor, J., concurring). In the present context of Congressional reapportionment, however, there are no analogous, direct textual references to such neutral apportionment criteria. Accordingly, the significance of these factors to the present equal protection and free and equal election challenges is limited by the degree to which their presence or absence would evidence intent or effects under Bandemer.

[5] The Presiding Officers raise a host of issues challenging the admissibility of the evidence adduced by Petitioners at the hearing before Judge Pellegrini. We need not resolve these issues as we find that Petitioners' evidence, even assuming that it is all admissible, is insufficient to entitle them to relief.

districts are "safe seats" for Democratic candidates, thus further undermining Petitioners' claim that Democrats have been entirely shut out of the political process. See Pope, 809 F.Supp. at 397 (the party which was allegedly discriminated against had not been shut out of the political process where it was virtually guaranteed to win some seats.)

Petitioners seem to believe that evidence of disproportionate results necessarily leads to a conclusion that there will also be a lack of political power and denial of fair representation, and that separate proof showing that the Democrats will be shut out of the political process is not necessary. In essence, Petitioners want us to collapse the two prongs of the effects test into one. This is precisely what the Bandemer plurality forbad, and we perceive no sound reason to ease Petitioners' burden in this respect.

Accordingly, we find that Petitioners have failed to carry their burden of establishing that Act 1 effectuates a political gerrymander in violation of the Pennsylvania Constitution, and thus deny relief on the state constitutional law claims raised in Petitioners' Petition for Review. As only the state law claims are before this court and those claims are dismissed, jurisdiction is relinquished.

Mr. Chief Justice Zappala files a dissenting opinion.