

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 464 M.D. 2021

Carol Ann Carter; Monica Parrilla; Rebecca Poyourow; William Tung; Roseanne Milazzo; Burt Siegel; Susan Cassanelli; Lee Cassanelli; Lynn Wachman; Michael Guttman; Maya Fonkeu; Brady Hill; Mary Ellen Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

vs.

Leigh Chapman, in Her Official Capacity as the Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Official Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

No. 465 M.D. 2021

Philip T. Gressman; Ron Y. Donagi; Kristopher R. Tapp; Pamela A. Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak

Petitioners,

vs.

Leigh Chapman, in her Official Capacity as the Acting Secretary of the Commonwealth of Pennsylvania ; and Jessica Mathis, in Her Official Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

**CORRECTED¹ POST-HEARING SUBMISSION OF SENATE
REPUBLICAN INTERVENORS JAKE CORMAN, PRESIDENT *PRO
TEMPORE* OF THE PENNSYLVANIA SENATE, AND KIM WARD,
MAJORITY LEADER OF THE PENNSYLVANIA SENATE**

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¹ As noted in their original filing, the Senate Republican Intervenors had not received a copy of the transcript of the hearing prior to the filing deadline. The Senate Republican Intervenors have since received a copy of the transcript and, for the benefit of the Court, have updated their proposed findings of fact with the appropriate citations to the transcript. In all other respects, this corrected filing is substantively identical to the original filing.

Although the testimony during the hearing was at times technical and complex, this case is not a particularly difficult one. The answer to the question at hand is straightforward and arises out of the foundational and fundamental constitutional principles that are found at the heart of this case.

The United States and Pennsylvania Constitutions, in this regard, have assigned the task of redistricting the Commonwealth's congressional districts to the Pennsylvania General Assembly. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015); Pa. Const. art. II, § 1. This task, in other words, is expressly and constitutionally committed to the people's elected representatives. It is a fundamentally legislative task.

At times, when the General Assembly and Governor are at an impasse regarding congressional redistricting, a court may be left with what the U.S. Supreme Court has described as "the unwelcome obligation of performing in the legislature's stead[.]" *Connor v. Finch*, 431 U.S. 407, 415 (1977). When these situations arise, however, congressional redistricting is still a fundamentally legislative endeavor. The Court's intervention does not mean that the task of redistricting becomes nothing more than a high-stakes cartography competition, to see which of various supercomputers, mathematicians, and academics can out-do the others when it comes to drawing maps in relation to various scientific metrics that are nowhere to be found in the law.

This point is especially pronounced here. House Bill 2146 (“H.B. 2146”) embodies a 17-district congressional redistricting plan that both the Pennsylvania Senate and House of Representatives have thoughtfully considered and passed. In light of this factor, H.B. 2146, as a plan that the people’s representatives approved, should receive special weight, consideration, or deference, so long as it meets the applicable redistricting requirements. And, as the evidence that the parties presented at the hearing shows, H.B. 2146 *does*, in fact, meet all of the applicable redistricting requirements: compact and contiguous territory, population equality, and respect for the boundaries of political subdivisions. The evidence, moreover, does *not* show that the H.B. 2146 plan is otherwise unlawful or “not sufficiently fair” in any other way.

No other party or *amici*, for that matter, has presented the Court with a proposed redistricting plan that has made its way through *any* part of the legislative process, let alone a plan that both the Senate and House have passed.² Unlike the

² It is important to note that two other parties to this litigation are capable of having introduced legislation through the legislative process had they felt their proposed redistricting plans were meritorious. Both the House Democrats and the Senate Democrats had available to them the ability to circulate co-sponsorship memos, introduce their own bill, or propose an amendment to H.B. 2146 at any time during the legislative process. Neither of them did so, instead making the choice to forego the legislative process set forth in the United States and Pennsylvania Constitutions. Similarly, the Governor refused to engage with legislative leaders on the drawing of maps between August 2021 and January 2022, suggesting that he had “no role” in the bill passage process. His lack of a “role” in the legislative process is belied by his own position in this case, as well his mid-January release of the very maps he submits to this Court for consideration, which were essentially presented as take-it-or-leave-it options for the legislature at the last legislative moment.

other proposed plans, therefore, H.B. 2146 is entitled to deference and special weight, in recognition of the General Assembly's constitutional prerogative to engage in redistricting. Indeed, H.B. 2146 reflects a transparent, deliberative, and open legislative process, which involved negotiations, compromise, and policy judgments, and which the people's elected representatives undertook in order to memorialize and implement state policy that reflects the will of their constituents. The Constitution does not envision that a supercomputer or individual expert witness will create a redistricting map that will govern congressional elections for a decade, no matter how technical and complex the computer's or expert's analysis might be.

It follows that, as noted at the outset, the issue before this Court is ultimately not a particularly difficult one. The answer is rooted in the basic constitutional principles that undergird this case. As a legislatively approved plan that meets all of the applicable redistricting criteria, H.B. 2146 is entitled to deference from the Court in order to honor the General Assembly's constitutional prerogative to engage in redistricting.

Against this backdrop, Senate Republican Intervenors Jake Corman, President *pro tempore* of the Pennsylvania Senate, and Kim Ward, Majority Leader of the Pennsylvania Senate, propose the following findings of fact.

PROPOSED FINDINGS OF FACT

A. Pennsylvania's Political Geography

1. The spacial distribution of voters throughout Pennsylvania, otherwise known as the Commonwealth's political geography, naturally favors Republican outcomes. In other words, a redistricting map that is drawn randomly and that complies with the traditional redistricting criteria, but that is not drawn with reference to any partisan data, will tend to yield more seats for Republicans than Democrats in comparison to vote share. (Tr. 506:15-507:8.)

2. This political geography is a function of the fact that Democratic voters tend to be concentrated in certain urban regions of the Commonwealth, including Philadelphia and Pittsburgh. By contrast, Republican voters tend to be distributed throughout the other parts of the Commonwealth. (Tr. 508:6-510:8.)

3. If a mapmaker, in drawing a congressional redistricting map, attempts to "adjust" or "control" for this phenomenon, that person is necessarily drawing the map with an intent to achieve a particular partisan outcome. (Tr. 510:9-22.)

B. The Legislative History of House Bill 2146

4. On December 8, 2021, House Bill 2146 ("H.B. 2146") was introduced and referred to the House State Government Committee.³

³ See Bill History for HB 2416, available at https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2021&sind=0&body=H&type=B&bn=2146 (last visited Jan. 26, 2022) ("Bill History").

5. H.B. 2146 embodied a 17-district congressional redistricting plan that a citizen and good-government advocate, Ms. Amanda Holt, had created on her own. (*See also* Grove Letter (Jan. 6, 2022) at Ex. A to Schaller Affidavit).

6. On December 15, 2021, H.B. 2146 was reported out of the House State Government Committee, as amended. (Bill History.)

7. H.B. 2146 was made available for public comment, engendering a total of 399 comments. (Grove Letter.) Those comments led to some additional changes to the bill, such as changes that were designed to increase the compactness of certain districts and ensure that certain communities of interest were preserved. (Grove Letter.)

8. On January 12, 2022, the Pennsylvania House of Representatives passed H.B. 2146 and referred it to the Senate for consideration. (Bill History.)

9. On January 12, 2022, H.B. 2146 was referred to the Senate State Government Committee. (Bill History.)

10. H.B. 2146 was reported out of the Senate State Government Committee on January 18, 2022, and was given first consideration on that same date. (Bill History.)

11. H.B. 2146 was given second consideration by the full Senate on January 19, 2022. (Bill History.)

12. On January 24, 2022, the Senate gave H.B. 2146 third consideration and passed it. (Bill History). H.B. 2146 was then presented to the Governor for his consideration. (Bill History.)

13. On January 26, 2022, the Governor vetoed H.B. 2146. (Bill History.)

B. The Factual Implications of House Bill 2146

14. H.B. 2146 contains contiguous districts. (*See* Reply Report of Dr. Jonathan Rodden (“Rodden Reply”) at 3; Reply Report of Dr. Daryl DeFord (“DeFord Reply”) at 3; Reply Report of Dr. Moon Duchin (“Duchin Reply”) at 2; Expert Report of John M. Memmi (“Memmi Report”) at 2).

15. H.B. 2146 contains compact districts, which score an average of .32 on the Polsby-Popper compactness metric, which is on par with the maps that the other parties submitted to the Court. (Reply Report of Dr. Michael Barber (“Barber Reply”) at 8, Table 1; Memmi Report at Figure 1).

16. H.B. 2146 achieves population equality between districts, within a one-person deviation. (DeFord Reply at 4; Memmi Report at 2 & Table 1).

17. H.B. 2146 splits only fifteen counties, sixteen municipalities, and nine precincts. (Expert Report of Dr. Michael Barber (“Barber Report”) at 16; Memmi Report at Figure 2).

18. Relative to the other plans that the parties submitted to the Court, H.B. 2146 splits just two more counties than the plan with the lowest number of county

splits, the same number of municipalities as the plan with the lowest number of municipality splits, and the lowest number of precincts of any plan. (*See Expert Reports*).

19. In passing H.B. 2146, the legislature made policy choices regarding which subdivisions should be divided in order to achieve population equality and where some level of compactness should be sacrificed in order to preserve a municipality or community of interest. (*See, e.g., Grove Letter.*)

20. H.B. 2146 does not split Pittsburgh, which, in light of its population, does not need to be split in order to achieve population equality between districts. (*Barber Reply at 9.*)

21. Splitting Pittsburgh so as to make it part of two congressional districts would likely convert what would otherwise be one district that would strongly favor Democratic candidates into two districts that would lean in favor of those candidates. (*Tr. 526:14-527:7.*)

22. Dr. Michael Barber analyzed H.B. 2146 by comparing it to a set of 50,000 simulated 17-district maps for the Commonwealth, all of which were randomly generated and all of which adhere to the traditional redistricting criteria that the Pennsylvania Supreme Court described in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). (*Barber Report at 13.*)

23. This method of comparing proposed maps with simulated maps, sometimes called an “ensemble analysis,” is commonly used as a technique in redistricting analysis. (Tr. 516:8-517:12.)

24. None of the simulated maps were generated with reference to any partisan data. (Tr. 514:15-25.)

25. After generating the simulated maps, Dr. Barber analyzed them in light of statewide election results from 2012 to 2020. (Barber Report at 15; Tr. 519:4519:25.) He considered those results on a collective and averaged basis. (Barber Report at 15; Tr. 520:1-8.)

26. Averaging the election results in this manner helps to control for variations that stem from the idiosyncracies of individual elections, such as the relative strength of individual candidates for office. (Barber Report at 15; Tr. 520:11-521:11.)

27. Based on this analysis, H.B. 2146, on a district-by-district basis, reflects partisan fairness that is consistent with the range of outcomes that Dr. Barber’s simulated plans reflect. (Tr. 528:3-529:14.)

28. H.B. 2146 includes five competitive districts, which is more than any other map that the parties and *amici* submitted to the Court; indeed, eleven of the other maps include between only one and three competitive districts. (Barber Reply at 8, Table 1.)

29. H.B. 2146 includes nine Democratic-leaning districts. This number is in line with the typical distributions of Democratic-leaning districts that the simulations reflect. (Barber Report at 22.)

30. There is no single measure that can fully assess the partisan fairness of any given proposed congressional redistricting map. (Tr. 218:25-219:3.)

31. The majoritarian responsiveness metric, for example, purports to measure how well, from a partisan perspective, voters of a given party can translate a majority vote share into a majority seat share. (Tr. 548:13-19.)

32. But the majoritarian responsiveness metric does not account for other factors, like split-ticket voting, nor does it take into account the extent to which an outcome would be deemed “anti-majoritarian” (*e.g.*, by one percent or thirty percent). (Tr. 289:24-291:6; 297:5-24.)

33. No witness testified that, under a given metric or combination of metrics, H.B. 2146 is unfairly biased from a partisan perspective or any other perspective.

34. Apart from H.B. 2146, the Court has not been presented with *any* proposed redistricting plan that has made its way through *any* part of the legislative process, let alone a plan that both the Senate and House have passed.

C. Plans that Other Parties and *Amici* Submitted to the Court

35. When he assessed the Carter Petitioners' map ("Carter Map"), Dr. Rodden did not consider splits to each of the six types of political subdivisions that are identified in Article II, Section 16 of the Pennsylvania Constitution. (Tr. 142:3-25.)

36. Dr. Rodden, instead, considered only splits of counties, "county subdivisions" (which is a census-derived category), and vote tabulation districts. (Tr. 143:1-9.)

37. The Carter Map and the map that the House Democratic Caucus submitted ("HDC Map") fail to achieve population equality within a one-person deviation. (DeFord Reply at 4; Tr. 204:13-20.)

38. In deciding where to split political subdivisions as they created their map ("GMS Map"), the Gressman Petitioners did not consider communities of interest. (Tr. 314:21-315:1.)

39. Among the maps that the parties and *amici* submitted to the Court, five of them split Pittsburgh, even though doing so is unnecessary to achieve population equality between districts: Governor Wolf's map ("Wolf Map"), both maps that the Senate Democratic Caucus submitted ("SDC Maps"), the map that Draw the Lines submitted ("Citizens Map"), and the map that the Khalif Ali group submitted ("Ali Map"). (Barber Reply at 8.)

40. In competitive districts, the Wolf Map and GMS Map were the most favorable to Democratic candidates when compared to the simulated maps that Dr. Barber generated. (Tr. 538:7-540:5.)

41. Unlike H.B. 2146, which includes nine Democratic-leaning districts (as noted above), eight of the other proposed maps include *ten or more* Democratic-leaning districts, which, according to the simulated plans that Dr. Barber generated, is not a typical outcome. (Barber Reply at 14-15.)

42. It is unknown who drew the Wolf Plan or whether partisan data was used in creating that plan. (Tr. 436:24-437:18.)

43. Computer-generated maps do not take into account all of the factors that have historically shaped election outcomes, including the power of incumbency, the relative strength of candidates for office, or the effects of being affiliated with the same political party as the President. (Tr. 700:4-712:16.)

44. Dr. Caughey views PlanScore as being a reliable tool for calculating efficiency gaps. (Tr. 985:5-9). He supported and deemed fair a congressional redistricting map for Oregon that, according to PlanScore, had an efficiency gap that was approximately two percentage points *worse* than H.B. 2146's efficiency gap. (Tr. 994:12-995:13.)

45. Dr. Caughey's analytical methods fail to account for political geography. (Tr. 999:15-22.)

46. Dr. Caughey cannot determine how much of the partisan tilt that he identifies in H.B. 2146 is the result of political geography. (Tr. 1000:3-1001:19.).

CONCLUSION

47. H.B 2146 adheres to the all of the traditional redistricting criteria, including the criteria regarding compact and contiguous territory, population equality, and respect for the boundaries of political subdivisions.

48. There is nothing in the record to show that H.B. 2146 is otherwise unlawful or in any other way “not sufficiently fair” for the Court to adopt it.

The legislative process is one that, under both the United States and Pennsylvania Constitutions, is the principal and preferred method for drawing congressional districts. As a legislatively-approved plan that meets all of the applicable redistricting criteria, the HB 2146 map is entitled to deference from the Court in order to honor the General Assembly’s constitutional prerogative to engage in redistricting.

These points are further explained in the Senate Republican Intervenors’ Opening and Responsive briefs, which are incorporated herein by reference.

For these reasons, the Senate Republican Intervenors respectfully request that the Court adopt the H.B. 2146 map.

Dated: January 29, 2022

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

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

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by PACFile eService as follows:

All counsel of record

Date: January 29, 2022

/s/ Anthony R. Holtzman
Anthony R. Holtzman