
IN THE SUPREME COURT OF PENNSYLVANIA

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 BALCHUNIS; TOM DEWALL; STEPHANIE
MCNULTY; and JANET TEMIN,

Petitioners,

v.

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.

No. 7 MM 2022

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,

v.

LEIGH M. CHAPMAN, in her official capacity as the Acting
Secretary of the Commonwealth of Pennsylvania; JESSICA
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**CARTER PETITIONERS' EXCEPTIONS TO
THE SPECIAL MASTER'S REPORT**

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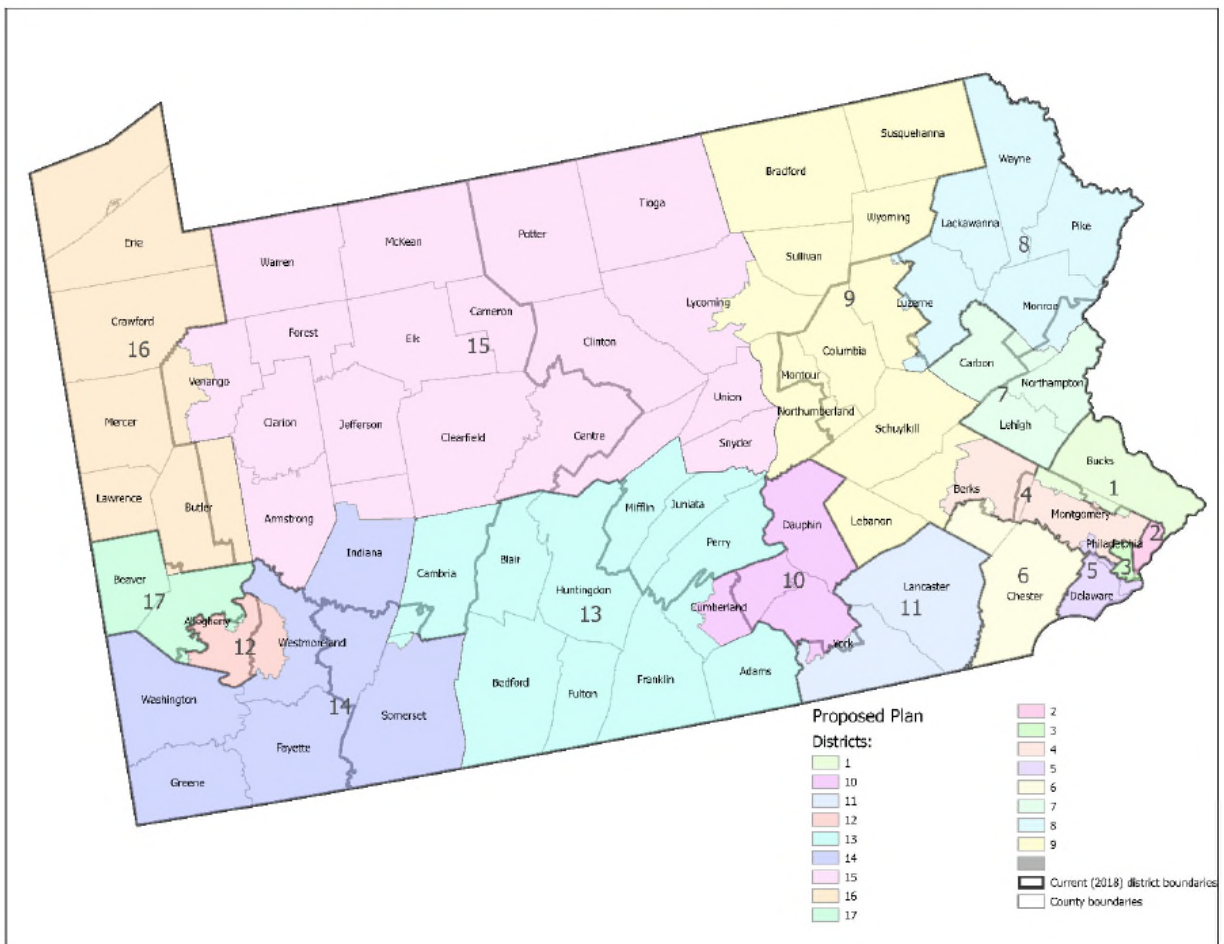
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I. General Exception

1. Erred in failing to display an image of the Carter Plan, in contrast to all the other plans under consideration (the “Submitted Plans”), which were each included in the Commonwealth Court’s Report & Recommendation (“Rep.”). *See* Rep. at 44 (FF1). For reference, the Carter Plan has been reproduced below.

Figure 5: Proposed Congressional District Boundaries



II. Expert Reports and Testimony

2. Erred in finding that all experts in the case were equally qualified to offer expert opinions, regardless of whether the experts or their reports had been

subject to cross examination, and what that cross examination revealed. *See Rep.* at 114 (FF338).

3. Erred in admitting into evidence additional expert reports submitted by Dr. Thomas Brunell on behalf of the Congressional Intervenors and Dr. John Memmi on behalf of the Senate Republican Intervenors. *See Rep.* at 114–15, 117.

4. Erred in electing to credit opinions, analyses, and conclusions of certain experts, including Dr. Michael Barber and Dr. Keith Naughton, but inconsistently crediting the opinions, analyses, and conclusions of other experts, such as Dr. Jonathan Rodden, Dr. Daryl DeFord, and Dr. Moon Duchin.

A. Dr. Jonathan Rodden (*Carter* Petitioners)

5. Erred in failing to find that Dr. Jonathan Rodden was the only expert that testified during proceedings before the Special Master who actually drew the map he or she was offering opinions on, and erred in not according the Carter Plan more weight on that basis. *See Rep.* at 58–66 (FF1–51).

6. Erred by finding that “Dr. Rodden did not give a straight answer” “when asked about his overall conclusions about how the Carter plan compares to the 2018 Remedial Plan.” *Rep.* at 61 (FF25). Dr. Rodden testified that he was “able to quantitatively analyze” how the Carter Plan compares to the 2018 Remedial Plan by “looking at the population data and overlaying the maps . . . to get just a simple measure that says what percentage of the population in each district that [he] created

was already in that district,” which he did “district by district and look[ing] at the plan as a whole,” ultimately concluding that “the maps were very similar . . . and the share of the population that was contained . . . in each district . . . [on] average, . . . was 87 percent.” N.T. at 114–15.

7. Erred by finding that “Dr. Rodden . . . appeared to admit that there may be a slight discrepancy in his calculation of HB 2146’s total county subdivision splits.” Rep. at 64 (FF44). Dr. Rodden testified that “*if* there [was] a slight discrepancy” between his calculation and the Legislative Data Processing Center’s tabulation of HB 2146’s total subdivision splits, it was probably due to “different municipal terminologies” used by Dr. Rodden and the Legislative Data Processing Center. N.T. at 151–53 (emphasis added).

8. Erred by finding that “Dr. Rodden . . . did not conduct a simulation analysis in this case, although he was capable of doing so, because ‘it didn’t occur to [him] that drawing a [sic] 100,000 other plans was something that [he] should do.’” Rep. at 65 (FF46) (alterations in original). Dr. Rodden testified that, in this case, he was “asked to draw . . . a plan and evaluate its fairness,” whereas the simulations analysis “is a technique that’s used to identify gerrymandering and . . . to understand some aspects of political geography.” N.T. at 158.

B. Dr. Michael Barber (House Republican Intervenors)

9. Erred in failing to find that Dr. Barber has limited experience using an algorithm to generate simulated plans prior to January 2022 and has never published in the areas of redistricting, partisan influence in the redistricting process, or simulated redistricting analyses, and thus erred in crediting Dr. Barber’s simulations where there is no basis to do so. *See* Rep. at 165 (FF5, 8); 176 (FF20–23); 209 ¶ 66; *see also* N.T. at 561–62.

10. Erred in failing to find that multiple courts have concluded that testimony given by Dr. Barber should be given little weight or no credit. *See, e.g.*, Rep. at 165 (FF11); *see also* N.T. at 562–66; *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *95 (N.C. Super. Ct. Sep. 3, 2019) (“In light of the above shortcomings in Dr. Barber’s analysis, the Court gives little weight to his testimony.”); *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1246 (N.D. Fla. 2020) (not crediting Dr. Barber’s testimony).

11. Erred in failing to find that Dr. Duchin found “clear errors of calculation” in Dr. Barber’s findings. *See, e.g.*, Rep. at 165 (FF11); *see also* N.T. at 368.

12. Erred in finding that any of Dr. Barber’s opinions, calculations, or analyses were credible in light of evidence that Dr. Barber does not have the proper

expertise and credibility and does not employ a replicable and accurate methodology.

C. Dr. Keith Naughton (Congressional Intervenors)

13. Erred in crediting the testimony of Dr. Naughton, despite finding that:

a. “Dr. Naughton . . . acknowledg[ed] that he [is] not a mathematician[,] . . . has ‘no particular experience in redistricting,’ and has never served as an expert in redistricting litigation before.” Rep. at 93 (FF215); 95 (FF225); *see also* Rep. at 114 (FF338);

b. “Dr. Naughton conceded that he provided no quantitative analysis of how any of the proposed plans perform on the neutral redistricting criteria” and “Dr. Naughton agreed that his report ‘does not identify any particular methodology’ that he used to arrive at his conclusions, and does not ‘cite any authority or particular evidence for [his] opinions.’” Rep. at 94 (FF219–220); *see also* Rep. at 114 (FF338); and

c. “[M]uch of [Dr. Naughton’s] professional career has been dedicated to helping Republican candidates in Pennsylvania win their seats,” and Dr. Naughton was retained in this case to testify on behalf of Republican interests. Rep. at 94 (FF218); *see also* Rep. at 114 (FF338).

14. Erred in crediting Dr. Naughton’s testimony over testimony of other experts in this case that have a proven body of credible expert work. *See, e.g.*, Rep. at 160 (FF22–28).

15. Where the Court found that Dr. Naughton’s expertise is based solely on his work experience in Pennsylvania campaign politics, Rep. at 93–94 (FF216–218), and Dr. Naughton admitted that he has not worked in Pennsylvania campaign politics since 2015, *see* Naughton Rebuttal Rep. Appx. 1 at 3; N.T. at 769, erred in crediting Dr. Naughton’s testimony that:

a. Pittsburgh voters *presently* tend to particularly favor local candidates in statewide elections, *see* Rep. at 150 (FF10);

b. Pittsburgh voters *presently* share common interests in a representative’s advocacy for the acquisition of federal funds and the obtaining of constituent services, *see* Rep. at 150 (FF11); and

c. Voters in Scranton and Wilkes-Barr *presently* prefer to be in separate districts, *see* Rep. at 96 (FF231)

despite Dr. Naughton admitting that he has not conducted or reviewed any public opinion polling in support of his opinions. *See* N.T. at 775–76.

16. Erred in failing to find that Dr. Naughton conflated voter party identification with communities of interest. *See* Rep. at 96 (FF229).

III. Traditional Redistricting Criteria

17. Erred in consistently finding that certain Submitted Plans, such as HB 2146 and the Reschenthaler Plans, are in compliance with the required redistricting principles, but failing to consistently find and credit that other Submitted Plans, such as the Carter Plan, are also in compliance with those same redistricting principles.

A. Contiguity

18. No errors as to findings on contiguity.

B. Equal Population

19. Erred in concluding that the maximum population deviation for congressional districts is 10 percent, where that is the standard for state legislative districts only, and the standard for congressional districts is “as nearly equal in population as practicable,” which is satisfied by a deviation of plus or minus one person. *See* Rep. at 138 (CL3); *see also Evenwel v. Abbott*, 578 U.S. 54, 59–60 (2016) (specifying that the 10% maximum deviation threshold applies to state and local legislative districts).

20. Erred in finding and concluding that the Carter Plan is to be given less weight for producing a two-person deviation, as opposed to one-person deviation, where the constitutional requirement that congressional districts be created “as nearly equal in population as practicable” is satisfied by a two-person deviation. *See*

Rep. at 138–39 (CL1–4; FF3). *See Carter Petitioners’ Brief in Support of Exceptions (“Brief in Support”)*, section III.A.1.

C. Compactness

21. Erred in failing to find that the Carter Plan had one of the highest Reock compactness scores out of all of the Submitted Plans. *See Rep. at 141 (FF4)*. *See Brief in Support*, section III.A.2.

D. Integrity of Political Subdivisions

22. Erred in failing to compare across all plans the total number of splits of subdivisions, instead only comparing the number of subdivisions that were split (even if each subdivision was split more than once). *See Rep. at 146 (FF36–38)*. *See Brief in Support*, section III.A.4.

23. Erred in failing to find that the splitting of certain political subdivisions is more important in assessing a plan than the splitting of others, with the split of counties being the most important metric. *See Rep. at 146–47 (FF36–43)*; *see also N.T. at 250–51 (Dr. DeFord agreeing that it is more important to avoid a county split than a borough split)*. *See Brief in Support*, section III.A.4.

IV. Historical Redistricting Criteria

A. Communities of Interest

24. Erred in finding that “Dr. Rodden . . . did not explicitly examine or appear to have considered the specific considerations that need to be taken into

account when establishing that splits maintain the surrounding communities of interest,” where Dr. Rodden did in fact provide extensive and specific discussion in his report and during his testimony about the Carter Plan’s preservation of communities of interest. Rep. at 156 (FF12); *see* Rodden Initial Rep. at 8–20 (Jan. 24, 2022) (specifically detailing decisions and tradeoffs to drawing boundaries for every district in the Carter Plan to achieve population equality, and specifically noting decisions to avoid splits in District 5, and unifying areas in Districts 7 and 15). *See Brief in Support*, section III.B.3.a.

25. To the extent Dr. Naughton’s testimony is to be credited, erred in failing to find that the Carter Plan is consistent with Dr. Naughton’s suggested configurations of communities of interest across the state. Rep. at 151 (FF17), 157–59 (FF15–20); 210–11 ¶¶ 70–75; *see also* Rodden Initial Rep. at 14, 20 (Jan. 24, 2022) (consistent with Dr. Naughton’s testimony, the Carter Plan keeps Bucks County whole, extended Bucks County into Montgomery County, attached portions of South Philadelphia with Delaware County, and did not split the City of Pittsburgh).

B. Incumbent Pairing

26. Erred in failing to find that, due to population loss in the center of Pennsylvania, the district that was eliminated was previously represented by a

Republican representative. *See* Rep. at 178 (FF1), 180 (FF11); *see also* Rodden Initial Rep. at 23 (Jan. 24, 2022). *See Brief in Support*, section III.B.3.c.

27. Erred in finding that the pairing of representatives based on their party affiliation or status as a candidate can be more or less indicative of unfair burdens on incumbents. *See* Rep. at 179 (FF2–5).

C. Partisan Fairness

28. Erred in failing to give more weight to the partisan fairness of the Carter Plan, given that it was the only plan expressly drawn without consideration of partisan performance. *See generally* Rep. at 162–76; N.T. at 117–18.

29. Erred in relying on metrics related to human geography and simulations as benchmarks of partisan fairness. *See generally* Rep. at 162–66. *See Brief in Support*, section III.B.1.b.

30. Erred in finding that the difference of “a few percentage points” is insignificant in evaluating mean-median calculations, where this Court has credited expert testimony asserting that the “range” of what is considered normal for this metric is in the narrow range between zero to four percentage points. Rep. at 172 (FF25); *see League of Women Voters v. Commonwealth*, 178 A.3d 737, 774 (Pa. 2018).

31. Erred in crediting Dr. Barber’s simulations over Dr. Duchin’s simulations, as well as crediting Dr. Barber’s calculations of the Efficiency Gap

metric over other experts, where every other expert that performed the calculation found HB 2146 to be significantly more unfair. *See* Rep. at 176 (FF22). *See Brief in Support*, section III.B.1.a.

32. Erred in concluding that plans which prioritize proportional election outcomes such as “negating a natural geographic disadvantage to achieve proportionality at the expense of traditional redistricting criteria” will *per se* violate the Pennsylvania Constitution’s Free and Equal Elections Clause, where proportionality is an important proxy for measuring partisan skew or unfairness as it relates to the desires of the state’s voters. Rep. at 177. *See Brief in Support*, section III.B.1.b.

33. Erred in concluding that proportionality is not a “goal of redistricting” and thus “any plan that attempts to achieve proportionality . . . must be disregarded.” Rep. at 178 (CL1; FF1). *See Brief in Support*, section III.B.1.b.

34. Even accepting the erroneous conclusion that a plan that results in proportional election outcomes is *per se* a violation of the Free and Equal Elections Clause of the state’s constitution, erred in failing to find that, pursuant to the opinion of Dr. Barber, which the Special Master has erroneously chosen to credit, HB 2146 shows a Democratic skew of 9 Democrat-leaning districts (*see infra* ¶ 40), and thus would also be a *per se* violation of the Pennsylvania Constitution. Rep. at 177; *see also* Barber Rebuttal Rep. at 15 (Jan. 26, 2022).

D. Least Change

35. Erred in concluding that the least-change approach is of “limited utility,” and that utilizing the least-change approach is different from evaluating redistricting plans against traditional criteria, where comparison to the 2018 Remedial Plan is a way to measure the degree to which the Carter Plan mirrors a map previously drawn by this Court that maximized adherence to every redistricting principle and where preservation of prior districts is a redistricting principle specifically enumerated by this Court. Rep. at 184 (CL3–4). *See Brief in Support*, section III.B.2.

36. Erred in concluding that the *Carter* Petitioners were proposing reliance on the least-change doctrine as a way to require, or sanction, a court to defer to its own prior redistricting map, where the least-change doctrine is merely crediting the most recent constitutional map, regardless of whether it was enacted by a legislature or drawn by a court. *See* Rep. at 187 (CL11). *See Brief in Support*, section III.B.2.

37. Erred in finding that the *Carter* Petitioners elevated a “subordinate factor into a dominate one” and thus “violate[d] the Free and Equal Elections Clause as a matter of law,” where the evidence showed that the Carter Plan sufficiently meets every one of the traditional *and* historical redistricting factors, that Dr. Rodden drew the Carter Plan with particular attention to those redistricting criteria, and that the least-change analysis is also a way to measure the degree to which the Carter

Plan adheres to the redistricting principles as established by this Court just four years ago. Rep. at 187 (FF10). *See Brief in Support*, section II.B.

38. Erred in finding that Dr. Rodden’s calculations of retained population share was not useful because “Dr. Rodden does not explain the extent to which the percentages of retained population share is either acceptable or so disparate so as to justify the elimination of any of the other plans or conversely to prioritize the Carter Plan based on this criterion,” where Dr. Rodden expressly offered the calculations as a way to compare which of the Submitted Plans retained the highest population distribution from the 2018 Remedial Plan, and thus least disrupts the existing districts. Rep. at 185 (FF7); Rodden Rebuttal Rep. at 1–2 (Jan. 26, 2022).

V. HB 2146

39. Erred in concluding that the HB 2146 Plan should be accorded any particular deference because it passed the legislative branch, given that it was vetoed by Governor Wolf and the veto has not been overridden. Rep. at 215–16 ¶¶ 96–97. *See Brief in Support*, section III.C.

40. Erred in finding that the HB 2146 Plan predicted a result of 9 Democratic-leaning seats and 8 Republican-leaning seats, and is thus more favorable to Democrats, when in fact HB 2146 is more favorable to Republicans and will likely result in the election of at least 9 Republicans. *See* Rep. at 211 ¶ 78; Rodden Rebuttal Rep. at 9–11 (Jan. 26, 2022).

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