

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| _____ |) | |
| League of Women Voters of Pennsylvania, <i>et al.</i> , |) | |
| |) | Civ. No. <u>261 MD 2017</u> |
| <i>Petitioners,</i> |) | |
| |) | |
| v. |) | |
| |) | |
| The Commonwealth of Pennsylvania, <i>et al.</i> , |) | |
| |) | |
| <i>Respondents.</i> |) | |
| _____ |) | |

PROPOSED ORDER

AND NOW this _____ day of December, 2017, upon consideration of
Petitioners' Motion *in Limine* to Exclude Certain Portions of Dr. Gimpel's
testimony and after having heard argument on said Motion, IT IS HEREBY
ORDERED that Petitioners' Motion *in Limine* is DENIED.

The Honorable P. Kevin Brobson

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**LEGISLATIVE RESPONDENTS' OPPOSITION TO PETITIONERS'
MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF DR. JAMES
GIMPEL REGARDING THE INTENDED OR ACTUAL EFFECT OF
THE 2011 MAP ON PENNSYLVANIA'S COMMUNITIES OF
INTEREST**

Legislative Respondents respectfully request that after considering Petitioners' Motion *in Limine* to Exclude Testimony from Dr. James Gimpel Regarding the Intended or Actual Effect of the 2011 Map on Pennsylvania's Communities of Interest, and Legislative Respondents response, this Court should DENY Petitioners' Motion.

INTRODUCTION

Petitioners seek to exclude Dr. Gimpel's testimony because (1) he does not know the actual intent of the legislature, (2) if he does, it could only have come from the legislature and Legislative Respondents failed to turn over such information, and (3) Dr. Gimpel does not have any independent expertise relating to the subject matter of this matter. But each of these positions are incorrect. First, Petitioners ignore the fact that both direct and indirect evidence can be used in evaluating whether districts were drawn for a partisan advantage. Second, Dr. Gimpel did not rely upon any data from the legislature. Third, Dr. Gimpel's qualifications demonstrate he is an expert on political behavior, political geography, geographic information systems

(“GIS”) and state politics, rendering his testimony greater than that of the average lay person.

To be clear, Dr. Gimpel will not testify as to the legislature’s actual intent and motivations in drafting the 2011 Plan. Rather, Dr. Gimpel’s analysis, which is common in redistricting cases, is to provide plausible non-partisan reasons for why the map *may* have been drawn based upon statistical analysis and/or his knowledge and experience of the underlying politics and geography. To express his expert opinion, Dr. Gimpel only needs the map and the publicly available data to opine on plausible reasons for why lines were drawn where they were drawn. Dr. Gimpel does not—as Petitioners state—need to be a mind reader. Pets.’ Br. at 9-10. Petitioners’ contentions in their Motion in Limine go to the weight, and not the admissibility of his testimony, and are more appropriate subjects for cross-examination.

**I. DR. GIMPEL’S TESTIMONY IS BASED UPON
INDIRECT EVIDENCE COMMONLY USED IN
REDISTRICTING CASES**

Petitioners’ premise that Dr. Gimpel can opine on legislative intent only if he has direct evidence of intent, e.g., statements from legislators, is false. Dr. Gimpel—as with Dr. Kennedy—can opine on whether districts appear drawn for partisan advantage without knowledge of specific intent by using statistical analysis and/or their knowledge of the underlying politics and

geography. Litigants in redistricting cases can attack and defend redistricting plans through either direct or indirect evidence of intent.¹ Accordingly, courts routinely rely on expert analysis of data to determine legislative intent.

Dr. Gimpel’s expert report is no different.

First, Dr. Gimpel never prefaces his opinion with “the legislature intended.” Rather, he provides a response to Dr. Kennedy’s expert report about the legislature’s *presumed* intent by providing plausible alternatives. *See* Pets.’ Ex. A at 18 (“Professor Kennedy suggests that the district was packed with Democrats, but this is an overstatement.... The district’s political leaning simply reflects the underlying patterns of political inclination and population change in the area.”); *id.* at 20 (“The Kennedy report speculates

¹ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (circumstantial evidence, such as patterns, that are otherwise unexplainable on other grounds can prove intent); *Hunt v. Cromartie*, 526 U.S. 541, 549-550 (1999) (in a Fourteenth Amendment racial gerrymandering challenge, the State’s expert reviewed racial demographics, voting registration, and election result data and with that data was able to opine on whether the legislature’s had a predominate racial intent or a partisan intent in drawing North Carolina’s Twelfth Congressional District); *Easley v. Cromartie*, 532 U.S. 234, 246-53 (2001) (reviewing plaintiffs’ and state’s experts’ analysis of North Carolina’s congressional districts and their racial and political composition to determine whether race predominated the legislature’s intent in drawing the congressional districts). *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (“The plaintiff may make the required showing through ‘direct evidence’ of legislative intent, circumstantial evidence of a district’s shape and demographics,” or a mix of both.”) (quoting and citing *Miller v. Johnson*, 515 U. S. 900, 916 (1995)).

that there were Democratic voters in Mercer County who had to be counterbalanced elsewhere... but keeping city and suburbs together in this case would result in considerable population imbalance between these two districts that would be more difficult to makeup elsewhere.”); *id.* at 24 (stating that District 12 was not constructed as a “safe Republican seat” because Republican registration was only 37.4% at the time it was drawn, compared with 52.9% for Democrats. Democrats have lost registrants in the area encompassed by the previous District 12, as Table 2 indicates, but unaffiliated ranks have grown faster than Republicans.”); *compare with, e.g., Easley*, 532 U.S. at 252 (explaining State’s expert’s analysis that city and county splits are just as equally explained on partisan grounds and that race did not predominate the legislature’s determinations).

Second, if Dr. Gimpel is not qualified to give his opinion on what the legislature *may* have intended in drawing district lines, then Dr. Kennedy is not qualified either. Dr. Kennedy did not have data or facts from the legislature either. Petitioners fault Dr. Gimpel for prefacing his comments by saying, for example, “the decision to divide... was made to...” *Pets.’ Br.* at 9. But Dr. Kennedy’s report makes the same kinds of assertions. *See Pets.’ Ex. B* at 2, 5-6, 29 (defining “cracking” as the intentionally placing of voters of a particular party in a district where “they are outnumbered by voters of the

opposing party” and further stating that the 2011 Plan “cracks” Democratic voters in an egregious manner and stating that Reading is “isolated” “in order to crack its Democratic voters and place them within the more safely GOP terrain of the 16th Congressional District.”). Dr. Kennedy no more “knows” that Reading was isolated to “crack” Democrats than Dr. Gimpel “knows” that Reading was kept whole as a community of interest. Pets.’ Ex. A at 26.

With his background in political behavior, political geographic, GIS systems, and state politics, Dr. Gimpel is eminently qualified to analyze election result data, demographic data, and opine on the alternative reasons as to why the legislature drew lines in certain locations. This Court should permit Dr. Gimpel to testify to all aspects of his report.

II. DR. GIMPEL USED ONLY PUBLICLY AVAILABLE DATA WHICH WAS DISCLOSED TO PETITIONERS.

Petitioners have already raised the issue of the data Dr. Gimpel relied upon and this Court already rejected it, stating that the question of what data Dr. Gimpel relied upon is more appropriate in an objection raised at trial or during cross-examination. *See* Order on Pets.’ Mot. to Exclude Portions of Dr. Gimpel’s Report at 2 (Dec. 7, 2017). The Court based its order on representations by Legislative Respondents’ counsel that Dr. Gimpel did not rely on any data that was previously withheld on privilege and that the data

and analysis Dr. Gimpel used was produced to Petitioners. *See id.* Dr. Gimpel did not use any data from any non-public source or source that was not disclosed to Petitioners. Nor did Dr. Gimpel speak with any legislator or legislative employee. Pets.' Ex. C at 35:12-25.

III. DR. GIMPEL IS MORE THAN QUALIFIED TO TESTIFY AS AN EXPERT IN THIS CASE.

Petitioners next argue that Dr. Gimpel lacks expertise relating to the subject matter of this action. But Petitioners ignore the extensive experience identified in his CV. Dr. Gimpel is a Professor of Political Science at the University of Maryland specializing in:

- Political Behavior;
- Political Geography;
- Geographic Information Systems (GIS); and, *inter alia*
- State politics.

He has published in peer reviewed political science journals and has published several books. Pets.' Ex. A at 1. In two of his books, he has dedicated chapters to discussing Pennsylvania's political history. *See* National Elections and the Autonomy of American State Party Systems: Chapter 4: Deindustrialization and the Erosion of Party Unity: Ohio and Pennsylvania. Gimpel, James (University of Pittsburgh Press 1996); Separate Destinations:

Migration, Immigration and the Politics of Places, Chapter 7 “Pennsylvania: Deindustrialization and Division.” (University of Michigan Press, 1999).
Pets.’ Ex. D. at 1. Moreover, Dr. Gimpel will testify that he currently teaches a course on GIS and redistricting and that he and his class are studying Pennsylvania. This is more than sufficient to qualify him as an expert in understanding Pennsylvania’s political boundaries:

[T]he standard for qualification of an expert *witness is a liberal one*. The test to be applied when qualifying an expert witness is whether the witness *has any reasonable pretension to specialized knowledge on the subject under investigation*. . . . It is also well established that a witness may be qualified to render an expert opinion based on training and experience. . . . *It is not a necessary prerequisite that the expert be possessed of all the knowledge in a given **field***, only that he possess more knowledge than is otherwise within the ordinary range of training, knowledge, intelligence or experience.

Freed v. Geisinger Med. Ctr., 601 Pa. 233 (2009).

Dr. Gimpel specializes in political geography and political history.
Pets.’ Ex. A at 1. His written work includes studies on Pennsylvania’s political history. Nothing more is required for him to qualify as an expert.

IV. CONCLUSION

Dr. Gimpel is eminently qualified to analyze the 2011 Plan and offer opinions on whether it was drawn for a partisan advantage based upon demographic data, election result data, voter registration data, all of which is publicly accessible, or based upon his knowledge of Pennsylvania politics and

geography—just like Professor Kennedy. This Court should permit him to testify to all matters contained in his report.

December 11, 2017

Respectfully Submitted

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