

BEFORE THE SUPREME COURT OF PENNSYLVANIA

**Nos. 126 MM 2012, 127 MM 2012, 128 MM 2012, 129 MM 2012, 130 MM 2012,
131 MM 2012, 132 MM 2012, 133 MM 2012, 134 MM 2012,
39 WM 2012, 40 WM 2012, 41 WM 2012, 42 WM 2012**

**REPLY BRIEF OF PETITIONERS JOSH SHAPIRO, LESLIE RICHARDS, DAYLIN
LEACH, SAMUEL ADENBAUM, IRA TACKEL, MARCEL GROEN, HARVEY
GLICKMAN, AND DAVID DORMONT**

**Appeal from the June 8, 2012 Final Reapportionment Plan and Reapportionment Map of
the 2011 Legislative Reapportionment Commission**

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The 2011 Legislative Reapportionment Commission makes great emphasis of what it deems a “legitimate interest” in “continuity of representation” as justifying the repeated violations of existing political boundaries in the proposed 2012 Final Plan. *See* Respondent’s Br. At 14-15, 40, 59-61. Effectively, the Commission seeks to elevate this interest as co-equal to those explicitly contained within Article II, Section 16 of the Pennsylvania Constitution.

This argument is contrary to the text and history of the constitutional provisions. Instead, as a careful study of the 1968 Debates demonstrates, the intent of the framers was to create a Legislative Reapportionment Commission which would be sufficiently independent from the Legislature itself so it could make difficult choices and sometimes pit legislator against legislator when population shifts and existing political boundaries so demanded. While continuity of representation may be a legitimate interest to be respected during the redistricting process, the drafters of the redistricting provisions argued it must remain subordinate to those requirements contained within the constitutional text—that each district be made of “compact and contiguous territory as nearly equal in population as practicable,” and that “[u]nless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.” Indeed, multiple speakers during the debates argued that a Commission was necessary to conduct a proper reapportionment, and that the task could not be trusted with the Legislature, because legislators would not vote for their own “extinction” and that a proper reapportionment often required such decisions to be made.

Moreover, the phrase “absolutely necessary” means precisely that; precedent confirms that Article II, Section 16 does not allow the Commission to violate the integrity of political subdivisions unless the other interests it respects so requires.

Because the 2012 Final Plan fails to meet these requirements, the Petition must be granted.

I. THE TEXT, HISTORY, AND STRUCTURE OF THE CONSTITUTIONAL PROVISIONS DO NOT SUPPORT THE COMMISSION'S INTERPRETATION

On February 7, 1968, the Constitutional Convention debated the provisions regarding the means of legislative reapportionment. The provisions were introduced by delegate Thomas Fagan of Allegheny County. 1 Pennsylvania Constitutional Convention 525 (Feb. 7, 1968). Bucks County Commissioner Jerry Powell, a delegate to the Constitutional Convention, presented an amendment regarding legislative reapportionment, but first laid out the principles which should guide the process:

The perfect apportionment should contain a number of qualities of various degrees of importance. They are: equality of population; no division of wards, boroughs or townships; no division of city lines; no division of county lines; contiguous districts; compactness; geographic considerations; and community of interest.

Id. at 532.¹ Unlike the proposal before the Convention, however, the Powell Amendment would cede primary redistricting authority to the legislature, and not to a Commission, unless the legislature failed to act within ninety days of the census certification. Delegate Robert Baldrige, an Indiana County farmer-lawyer involved in drafting the provisions, stood in response:

The first and primary aim of the committee in preparing this proposal was to keep legislative reapportionment as nonpolitical as any odd number of human beings could do. We considered almost every agency under the sun to do it and we came up with this program. When we considered letting the legislature do this because the legislature historically has done it and, except in three other States, still does it today, we were met at the outset with the complete ridiculousness of picking prejudiced judges to judge their own cases. If you consider that most of them are running for reelection, you have a judge with a financial interest in the outcome of the reapportionment before you even start.

¹ So far as Counsel for Petitioners can determine, while there was much debate over whether redistricting should be done by Commission or by the legislature directly, and over such topics as the numbering of Senatorial districts, there was no debate among the delegates as to the factors which the Commission was to consider during the redistricting process. At no point did any delegate suggest that incumbency protection should be enshrined as a principle of constitutional dimension.

Id. at 533 (emphasis added). This need to make difficult, nonpartisan decisions, Baldridge explained, was echoed in how the chairman of the Commission was to be selected if the four legislative leaders could not agree:

[T]he most nonpolitical governmental body that we have been able to find in the State was our Supreme Court, and when the seven judges had to agree on a person—certainly all the names that had been considered by the four leaders would be submitted to them and they knew they were picking someone to head as neutral and nonpartisan a commission as it could be made, they would pick a good person.

Id. Multiple delegates spoke in favor of Powell's proposal to allow the Legislature the first attempt a reapportionment until delegate Joseph Tomascik, a former member of the House of Representatives from Luzerne County, explained its inherent structural defect:

Mr. President and ladies and gentlemen of the Convention, the main thrust of the amendment under consideration now, it appears to me, would be to insert a prior step by having the legislature apportion itself first before the subject goes before the apportionment commission.

Ladies and gentlemen, I think it is axiomatic that it is natural to expect that persons will not vote for their own extinction. I think that when you ask the state legislature, as we have in the past, there is a tendency to be reluctant to take the appropriate steps to comply with apportionment. That is why this Committee on Method of Apportionment worked long and hard and considered many, many proposals; in fact, we had all of the proposers of the many proposals concerning reapportionment appear before us in public hearings to obtain from them the ideas which they sought to convey to us in order that we might pass a proposal or a recommendation that would meet with the approval of this Convention.

Id. at 537 (emphasis added). Even supporters of the Powell Amendment, like delegate William O'Donnell of Chester County, recognized the need for a Commission to act as a backstop given the likelihood that the Legislature itself could not properly apportion itself:

I believe that one of the reasons that our various States have failed to apportion—and not only Pennsylvania; this is not peculiar to Pennsylvania; this is peculiar to the entire United States—one of

the reasons they have failed adequately to apportion themselves in the past is that we give them an impossible job. We ask those members to become the judges of their own case. In every other area of the law, a judge who is passing on the merits of his own problem is asked to disqualify himself.

Further, we ask them to do that which is asking a great deal, and that is to ask a member whether he wishes to district himself out of an office or district his colleague of many, many years out of an office. I say, s̄r, and to this body, I believe that despite those problems, the House and Senate should be given the first opportunity to do so. If they cannot do so, I then think that we should buy a form of legislative apportionment commission which would step in and perform the job which the House and Senate have been unable to perform.

Id. at 535. The Powell Amendment was voted down, 86 nays to 49 yeas, with 28 delegates not voting. *Id.* at 538-39. In other words, the view which overwhelmingly prevailed before the framers of the constitutional provisions at issue was that the legislature could not be trusted to redistrict itself, and an independent commission was necessary, *because* proper reapportionment requires that some incumbents must lose their seats.² At no point did the delegates consider “continuity of representation” to be a valid constitutional concern. To the contrary, they elected to place redistricting authority in the hands of a Legislative Reapportionment Commission, and not the legislature itself, because sometimes a Commission must vote to place incumbents together, and/or move an incumbent’s district to another region of the Commonwealth, because of the explicit requirements of the Constitution to first respect

² On the federal level, the Washington Post reported that this year’s congressional redistricting yielded 13 different incumbent versus incumbent battles, with 11 being fought within a party’s own primary including Pennsylvania’s Twelfth District. *See* Rosalind S. Helderman, “2012 has more intraparty incumbent battles than ever before,” WASHINGTON POST, Jul. 23, 2012. This does not represent “massive disruptions” or “electoral chaos” as Respondent asserts; indeed, the Washington Post article notes the salutary effects of such competitive elections: “[B]y forcing voters to choose between compromisers and flame-throwers, old-timers and newcomers, they help determine the future direction of both parties.” *Id.* Moreover, given that the size of the Pennsylvania legislature has not changed, any incumbent versus incumbent battle conversely frees up an open seat in the Commonwealth to be contested by citizens, invigorating the legislature with new members.

equality of population, compactness and contiguity of districts, and the preservation of existing jurisdictional boundaries. While no one questions that “continuity of representation” *can* be considered, proper reapportionment sometimes requires extinction. The purpose of reapportionment is to ensure that Pennsylvania’s legislative districts move as Pennsylvania’s population moves; it is not to ensure permanent employment for today’s incumbents.³

As such, this Court’s decision in *In re 1991 Pennsylvania Legislative Reapportionment Comm’n* stands directly counter to the Commission’s attempts to elevate incumbency protection into a constitutional command. Instead, the Court explained in response to two Senators’ protest that their residences would no longer be located within the senatorial districts that they represent:

Our review of the Plan is limited to those enumerated constitutional requirements in Section 16 of Article II of our Constitution. That Section does not include a requirement that all senatorial districts be redrawn in such a manner that incumbent senators remain residents of their redrawn districts.

609 A.2d 132, 140, 530 Pa. 335 (1992). The Court properly recognized that it was within the “discretion” of the members of the Commission to consider incumbency as an interest, but at no point did this Court suggest that such a discretionary interest could supersede the constitutional requirements. Indeed, it is only when the districts are determined based on where voters reside, and not where legislators reside, that the legislators can truly be servants of the people and not vice versa. As Stanford Law professor Pamela Karlan has explained, “It used to be that the idea was, once every two years voters elected their representatives, and now, instead, it’s every ten years the representatives choose their constituents.”⁴ The 1967-68 Constitutional

³ To be sure, given that the next reapportionment plan will not be in effect until the 2014 legislative elections, current legislators and their potential challengers will have more than sufficient time to relocate, if necessary, in order to meet the Article II, Section 5 requirement that all legislators be citizens and inhabitants of their respective districts from one year next before the next election.

⁴ As quoted in Jeffrey Toobin, *Drawing the Line*, THE NEW YORKER, Mar. 6, 2006, at 35.

Convention enacted a structure to insist upon a less self-serving process, and its requirements as to the primary ends of redistricting should be enforced.

II. “ABSOLUTELY NECESSARY” MEANS “ABSOLUTELY NECESSARY”

Respondent cannot interpret the constitutional requirement that “[u]nless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district” to mean something other than what it does. “Absolutely necessary” means precisely that—that there can be no other option—as courts of this Commonwealth, as well as the Supreme Court of the United States, have recognized.

In *Barnes Foundation v. Keeley*, 171 A. 267, 311 Pa. 112 (1934), this Court was called upon to interpret the phrase “necessary for the efficient discharge of the business of the charity” in the context of tax exemptions generally afforded the assets of charitable corporations. As the Court explained, “‘Necessary for the efficient discharge’ does not mean an absolute necessity, but a reasonable necessity, embracing the ideas of convenience and usefulness for the purposes intended.” *Id.* at 269. Interpreting the same language, the Court in *Lycoming House v. Bd. of Revision of Taxes*, 64 Pa. D. & C. 42 (Phila. C.C.P. 1948), again recognized that “necessary” did not mean “absolutely necessary”; only the latter did:

Ordinarily, “necessary” denotes that which is “‘indispensable”, or “such in its nature and conditions that it *must* exist, occur, or be true”: *Funk and Wagnall’s Dictionary*. Applied strictly in this sense, most of the property of every charitable institution would be taxable, for only that would be exempt without which a particular charitable activity could not function. Hence it has been uniformly held that the word “necessary”, as used in the statute, does not mean an “absolute necessity”, but rather a “reasonable necessity”, or what is “convenient and useful”. Such phrases as these, however, though they substantially approximate the true meaning of “necessary” intended by the legislature, are lacking in certainty and clarity of definition.

Id. at 46 (emphasis in original). This understanding goes back to one of the landmark cases of the American legal canon, *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in

which Chief Justice John Marshall was called upon to explain the Necessary and Proper Clause in Article I of the United States Constitution, and again “necessary” was distinguished from “absolutely necessary” at length:

Is it true, that this is the sense in which the word “necessary” is always used? Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word “necessary” is of this description. It has not a fixed character, peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. The comment on the word is well illustrated by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a state from laying “imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws,” with that which authorizes congress “to make all laws which shall be necessary and proper for carrying into execution” the powers of the general government, without feeling a conviction, that the convention understood itself to change materially the meaning of the word “necessary,” by prefixing the word “absolutely.” This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Id. at 413-15 (emphasis added). The Pennsylvania Constitution contains the term “necessary” fourteen different times; it only employs “absolutely necessary” once—Article II, Section 16. This Court should give meaning to this deliberate choice of the provision’s drafters, which requires the Commission to return with a proposed redistricting plan which fragments existing counties, townships, wards, and other political subdivision only when absolutely necessary to fulfill one of the other stated requirements within the constitutional text.⁵

III. CONCLUSION

In explaining why the framers chose a Legislative Reapportionment Commission rather than allow the legislature to redistrict itself, delegate Thomas Fagan stressed they chose such a process because “we feel that by giving it to this commission that they can come up with the proper decisions of reapportionment that are in the best interest of all the citizens of Pennsylvania” 1 Pennsylvania Constitutional Convention 526 (Feb. 7, 1968). All the citizens—not all the incumbent legislators.

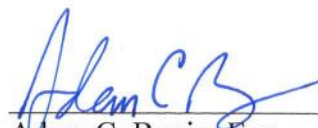
A desire to protect incumbents cannot justify the fragmenting of existing political subdivisions. The former does not make the latter “absolutely necessary.” Because the proposed 2012 Final Plan fails to meet the constitutional requirement of preserving existing jurisdictional boundaries except when absolutely necessary to accomplish other constitutionally specified goals, the *Shapiro* petitioners ask this Court to again remand the 2012 Final Plan to the

⁵ Petitioners find it difficult to understand the Commission’s assertion that a plan like Amanda Holt’s which forced incumbent versus incumbent contests could not have mustered a majority vote from the Commission. (Respondent’s Br. at 59.) Each Member of the Commission has sworn an oath to “support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and ... discharge the duties of my office with fidelity,” Pa Const’n, Art. VI, Sec 3, and as such they are duty-bound to adhere to the requirements of Article II, Section 16, even if certain colleagues’ feelings are hurt.

Commission, with direction to comply with this Court's decision in *Holt* and to eliminate the demonstrably unnecessary divisions of political subdivisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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