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IN THE SUPREME COURT OF PENNSYLVANIA

No. 17 MM 2022

RON Y. DONAGI; PHILIP T. GRESSMAN; PAMELA GORKIN; DAVID P. MARSH; JAMES L. ROSENBERGER; EUGENE BOMAN; GARY GORDON; LIZ MCMAHON; TIMOTHY FEEMAN; and GARTH ISAAK,

Petitioners

v.

2021 LEGISLATIVE REAPPORTIONMENT COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondents

In the Nature of an Appeal of the Final Plan of the 2021 Legislative Reapportionment Commission

BRIEF FOR *AMICUS CURIAE* KIM WARD, MAJORITY LEADER OF THE PENNSYLVANIA SENATE AND MEMBER OF THE 2021 LEGISLATIVE REAPPORTIONMENT COMMISSION

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INTEREST OF *AMICUS CURIAE*

In light of the results of the 2020 Census, and in accordance with Article II, Section 17 of the Pennsylvania Constitution, the 2021 Legislative Reapportionment Commission ("Commission"), on February 4, 2022, adopted a final redistricting plan for Pennsylvania's legislative districts ("Final Plan"). As the Majority Leader of the Pennsylvania Senate, *amicus curiae* Senator Kim Ward is one of the five members of the Commission. *See* Pa. Const. art. II, § 17(b). In that capacity, she voted in favor of adopting the Final Plan.

Now, in this appeal, the Petitioners are challenging the Final Plan and, in particular, claiming that the Pennsylvania Senate component of the plan ("Senate Plan") is contrary to law. As a member of the Commission who voted in favor of the Final Plan, and as the Majority Leader of the Senate, Senator Ward has a direct and substantial interest in defending the Senate Plan against this challenge.

Senator Ward submits this brief to highlight several deficiencies in the Petitioners' arguments. For one, in claiming that the Senate Plan violates Article II, Section 16 of the Pennsylvania Constitution because it splits more political subdivisions than "absolutely necessary," the Petitioners are ignoring multiple aspects of this Court's jurisprudence that control how subdivision-split-based challenges to reapportionment plans must be analyzed – and doing so in a way that is fatal to their claim. Also, in claiming that the Senate Plan is unlawful because it

embraces an "unjustified" and "unwarranted" level of pro-Republican bias, the Petitioners invoke various "partisan fairness" metrics even though this Court has never suggested that those metrics should be used in a challenge to a duly-adopted reapportionment plan that, like the Senate Plan, meets all of the traditional redistricting criteria (and one that has not otherwise been shown to constitute an unlawful gerrymander). In taking their approach, moreover, the Petitioners fail to acknowledge that, under the "partisan fairness" metrics that they identify, there is no judicially manageable standard for determining whether a reapportionment plan is "sufficiently fair." And they rely exclusively on evidence that is not part of the record and has never been tested through a hearing or similar adversarial process.

This Court should reject the Petitioners' challenges and uphold the Senate Plan.

No person or entity other than the *amicus curiae* and her counsel paid, in whole or part, for the preparation of this brief or authored the brief, in whole or part.

ARGUMENT

Under Article II, Section 16 of the Pennsylvania Constitution, a state reapportionment plan must meet the "traditional" redistricting criteria, meaning that it must contain compact and contiguous territory, maintain population equality between districts (as much as practicable), and, "[u]nless absolutely necessary," avoid splitting political subdivisions. *See* Pa. Const. art. II, § 16. The Petitioners

contend that the Senate Plan fails to meet the last of these criteria: minimization of subdivision splits. And they separately claim that, based on certain "partisan fairness" metrics, the plan demonstrates an "unjustified" and "unwarranted" level of pro-Republican bias, rendering it invalid. Both of these positions are misguided.

The Senate Plan Does Not Include an Unconstitutionally High Number of Subdivision Splits

The Petitioners contend that, for purposes of Article II, Section 16, the Senate Plan splits more political subdivisions than "absolutely necessary." *See* Math/Science Professors' Brief in Support of Petition for Review ("Petitioners' Brief") at 15. They claim, in this regard, that the Senate Plan "splits 23 counties, 3 cities, 0 towns, 8 boroughs, 1 township, and 8 wards, for a total of 43 splits of the political subdivisions listed in Pennsylvania's Constitution." *Id*. at 16. They go on to say that, using a "computational-redistricting process," they have shown that the number of splits is "demonstrably not necessary to achieve other [traditional] redistricting criteria" because they have created alternative plans that contain fewer subdivision splits and yet "meet[] or exceed[] the LRC Final Senate Plan's performance" on the other criteria. *Id*. at 19.

In employing this reasoning, however, the Petitioners are ignoring this Court's pronouncement in *Holt v. 2011 Legislative Reapportionment Commission*, 67 A.3d 1211 (Pa. 2013) ("*Holt II*") that subdivision splits can be "made absolutely necessary" by "competing constitutional, *demographic, and geographic*

factors[.]" *Holt II*, 67 A.3d at 1240 (emphasis added). This Court likewise explained that "redistricting efforts may properly seek to preserve communities of interest which may not dovetail precisely with the static lines of political subdivisions." *Id*. at 1241. And yet the Petitioners, who have the burden of proof, do not attempt to show that *any* of the subdivision splits in question cannot be justified in light of demographic or geographic factors or as a way to preserve communities of interest. *See* Pa. Const. art. II, § 17(d) (appellant has burden to establish that final plan is contrary to law). For this reason alone, they fail to substantiate their claim that the Senate Plan includes an unconstitutional number of subdivision splits.

The Petitioners also fail to acknowledge that the "focus [is] necessarily…on the plan as a whole rather than on individual splits and districts." *Holt II*, 67 A.3d at 1240. Along these lines, in upholding the Commonwealth's 2012 state reapportionment plan against challenges that were based on subdivision splits, the *Holt II* Court stressed that the question was not "whether there exists an alternative redistricting map which is claimed to be 'preferable' or 'better' than the LRC's map, but rather whether the LRC's proffered plan, which must balance multiple considerations, fails to meet core and enumerated constitutional requirements." *Id.* The Court, in turn, observed that "[v]iewed in raw terms (and not merely in comparison with other plans), the 2012 Final Plan has few raw splits when viewed

in comparison to the total number of counties, municipalities and wards in the Commonwealth." *Id.* The Court emphasized, in particular, that "[i]n the Senate, the 2012 Final plan splits only 25 out of 67 counties, only two out of 2563 municipalities, and only ten out of 4462 wards." *Id*. Along the way, it noted that, "[b]y necessity, a reapportionment plan is not required to solve every possible problem or objection in order to pass constitutional muster." *Id*.

Here, too, when the Senate Plan is viewed "in raw terms (and not merely in comparison with other plans)" – including in comparison with the Petitioners' alternative plans – it "has few raw splits when viewed in comparison to the total number of counties, municipalities and wards in the Commonwealth." In nearly every respect, in fact, the Senate Plan has *fewer* subdivision splits than the Senate portion of the 2012 reapportionment plan that this Court upheld in *Holt II*. The Senate Plan therefore does not split an unlawfully high number of political subdivisions.

The Petitioners' Use of "Partisan Fairness" Metrics is Misplaced

The Petitioners separately argue that "[a]ssessing the LRC Final Senate Plan across four objective measures of partisan fairness shows the Plan has a strong skew favoring Republicans, violating the Free and Equal Elections Clause," *i.e.*, Article I, Section 5 of the Pennsylvania Constitution. Petitioners' Brief at 20. The Petitioners highlight, in particular, the metrics that are known as the "majority-responsiveness

measure," the "close elections" test, the "mean-median" score, and the "efficiency gap" score. *See id.* at 22-33. For several reasons, this argument falls flat.

First, while the Petitioners invoke this Court's decision in *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) as their justification for attempting to bring "partisan fairness" metrics into the fold here, that decision does *not*, in fact, provide support for their approach.

In *League of Women Voters*, this Court sustained a challenge to Pennsylvania's 2011 congressional redistricting plan. The Court concluded that the plan violated the Free and Equal Elections Clause because – as evidenced primarily by the fact that it *failed to comply* with the *traditional redistricting criteria* in Article II, Section 16 – it constituted an unconstitutional partisan gerrymander. The Court explained that "the [2011 congressional] Plan cannot plausibly be directed at drawing equally populous, compact, and contiguous districts which divide political subdivisions only as necessary to ensure equal population." *Id*. at 818. It also explained that "[t]he fact that the 2011 Plan cannot, as a statistical matter, be a plan directed at complying with traditional redistricting requirements is sufficient to establish that it violates the Free and Equal Elections Clause." *Id*. at 820. But then, having made this determination, the Court turned its attention to certain evidence of record that pertained to "partisan fairness" metrics, as a way to confirm and reinforce what it had found. According to the Court, this evidence helped to corroborate that,

"in its disregard of the traditional redistricting factors, the 2011 Plan consistently works toward and accomplishes the concentration of the power of historically-Republican voters and, conversely, the corresponding dilution of Petitioners' power to elect their chosen representative." *Id*. at 820.

Here, by contrast, although there is a challenge to a duly-adopted redistricting plan (like in *League of Women Voters*), the challengers have *not* shown that the plan fails to comply with the traditional redistricting criteria (unlike in *League of Women Voters*). As explained above, the Petitioners are wrong in asserting that the Senate Plan fails to comply with the subdivision-splits criterion. And they do not contend that the Senate Plan violates any of the other traditional redistricting criteria. It follows that, unlike in *League of Women Voters*, there is no need to use "partisan fairness" metrics as a way to confirm or reinforce a determination that, in failing to adhere to the traditional criteria, a reapportionment plan amounts to an unconstitutional partisan gerrymander. Petitioners are therefore mistaken that, in view of *League of Women Voters*, there is a viable basis for using "partisan fairness" metrics to assess the Senate Plan for validity. Put differently, in the context of a challenge to a reapportionment plan, although this Court has used "partisan fairness" metrics to confirm that, because of a failure to adhere to the traditional criteria, a plan is an unconstitutional partisan gerrymander, it has *not* used those metrics to

assess whether a criteria-compliant and otherwise lawful plan (like the Senate Plan) is "not sufficiently fair" to be lawful.[1]

To the extent that, in his report regarding the Final Plan that he issued on March 4, 2022, the Chairman of the Commission suggests that partisan fairness metrics *should* be used in this manner, Senator Ward respectfully disagrees with him on this point. *See* Report of Mark A. Nordenberg, Chair of the 2021 Pennsylvania Legislative Reapportionment Commission, Regarding the Commission's Final Plan (Mar. 4, 2022) at 69-71 (making references to "partisan bias" scores, expressed as percentages). Notably, the Chairman created this report on his own, without Senator Ward's input. The report reflects only the Chairman's views, not Senator Ward's.

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[1] On March 9, 2022, this Court issued its opinion in *Carter v. Chapman*, 2022 WL 702894 (Pa. Mar. 9, 2022). In *Carter*, the Court was required to choose Pennsylvania's new congressional redistricting plan from among competing options, because "the General Assembly and the Governor failed to agree upon a congressional redistricting plan[.]" *Id*. at *1. The Court acknowledged that many of the competing plans satisfied the traditional redistricting criteria and were otherwise lawful. *Id.* at *11. The Court then "applied the aforementioned designated criteria and considerations," including partisan fairness metrics, in order to pick a plan from among the competing alternatives. *Id.* But the Court did *not* hold that partisan fairness metrics should be used, by themselves, to determine whether a traditional-criteria-compliant and otherwise lawful reapportionment plan is "not sufficiently fair" to be lawful in the first instance. Nor did it suggest how an analysis of that type could be performed.

Similarly, in a concurring opinion, Justice Donohue explained that, "I do not suggest that any of the plans submitted for consideration reflect a degree of partisan unfairness that is disqualifying in a constitutional sense, nor do I suggest the level of partisan fairness that a duly enacted congressional district plan must attain." *Id*. at *21 n.5.

And, of course, it does not reflect Senator Ward's reasons for why she voted to adopt the Final Plan.

Second, and along related lines, the Petitioners' "partisan fairness" metrics do not supply a judicially manageable standard for determining whether a reapportionment plan is "sufficiently fair" to be lawful. The Petitioners, as noted above, point to the "majority-responsiveness measure," the "close elections" test, the "mean-median" score, and the "efficiency gap" score. But they do not identify any objective standard or "score" that a reapportionment plan must achieve in order to be "sufficiently fair" (or, for that matter, "not sufficiently fair") under any of those metrics, individually or in combination with one another. In other words, if the Court were to constitutionalize some or all of these metrics, how would a neutral observer know whether, under the metrics at issue, a reapportionment plan was sufficiently fair? What is the "magic score?" Why? The Petitioners do not answer these questions and, of course, there are no answers to the questions. Whether something is "sufficiently fair" depends on how you define "sufficiently" and "fair" and there are many ways to define those terms, all of which involve making subjective judgments and all of which are inherently imprecise. Those factors, coupled with the reality that, as this Court has acknowledged, "redistricting has an inevitably legislative, and therefore an inevitably political, element[,]" *see Holt v. 2011*

Legislative Reapportionment Commission, 38 A.3d 711, 745 (Pa. 2012) ("*Holt I*"), render the Petitioners' use of "partisan fairness" metrics a misguided endeavor.

Third, the Petitioners' partisan fairness argument is based exclusively on evidence that is not part of the record and has never been tested through a hearing or similar adversarial process. Over the course of many pages in their brief, and in an attachment to their brief, the Petitioners discuss how their expert consultants went about applying the partisan fairness metrics to the Senate Plan and the results of those analyses. *See, e.g.,* Petitioners' Brief at 29 (asserting that "[t]he Math/Science Professors' experts overlaid the precinct-level election results on each map's district boundaries and then compared, for each election, the vote share that the Democratic candidate garnered statewide with the vote share that the same candidate would have garnered in each proposed plan's 'median' district"). But, in this litigation, those experts never drafted and served expert reports in which they laid out their opinions and the grounds for each opinion. They never offered direct testimony or were subject to cross-examination at a hearing or similar proceeding. Their work product regarding the Senate Plan was never tested before the Commission or elsewhere. There is, therefore, no way for the Court to assess their credibility as witnesses or the validity and reliability of their analyses.[2]

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[2] Senator Ward acknowledges that the Petitioners filed exceptions to the Commission's preliminary redistricting plan and that those exceptions are part of the "record" that was created before the Commission.

In like manner, the Petitioners baldly assert that the "level of pro-Republican bias" that their "partisan fairness" metrics detected in the Senate Plan "is not justified by the Commonwealth's political geography[.]" Petitioners' Brief at 34. They do not cite any evidence of record, let alone any non-record evidence, to support this assertion – because there is none. And, of course, it is generally understood that the Commonwealth's political geography does, in fact, naturally favor Republican outcomes. In particular, a reapportionment 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.

From an evidentiary perspective, therefore, the Petitioners cannot substantiate their contention that the Senate Plan "exhibits excessive pro-Republican bias and unfairly dilutes the votes of Democratic voters." Petitioners' Brief at 20.

CONCLUSION

This Court should reject the Petitioners' challenges and uphold the Senate Plan.

Respectfully submitted,

March 11, 2022

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CERTIFICATE OF WORD COUNT

I hereby certify that, based on the word count feature of Microsoft Word 2016, the foregoing Brief for *Amicus Curiae* complies with the word-count limit described in Pennsylvania Rule of Appellate Procedure 531(b)(3).

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATION OF COMPLIANCE WITH RULE 127

The undersigned certifies 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

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