

REDISTRICTING TESTIMONY
PENNSYLVANIA SENATE STATE GOVERNMENT COMMITTEE
Wednesday, November 10, 2021

Good day. I am Mark Pavlovich, a resident of West Goshen Township in Chester County. Thank you for this opportunity to share my views on the upcoming redistricting of Pennsylvania's Congressional Districts.

By way of background, I've lived in the Commonwealth for some thirty years working in higher education and government relations in western and central Pennsylvania and most recently in Chester County. As a result, I've had the opportunity to learn much about the Commonwealth's diversity and the challenges to progress both in Harrisburg and Washington. This includes witnessing Pennsylvania's three most recent redistricting efforts, each being more partisan and divisive than the previous one. Indeed, scholars and laypeople agree that Pennsylvania is among the most notorious examples of gerrymandering in America.

In the 2010 redistricting, Chester County was the victim of some of the worst examples of gerrymandered Congressional districts in American history. While most everyone remembers the infamous "Goofy Kicking Donald Duck" 7th District that spread across four counties including Chester County with some sections only a block wide, many forget that other districts, such as the former 6th, 12th, 13th, and 16th, were nearly as badly drawn specifically for political advantage. Through my experiences in government relations and service with numerous economic development groups, I've seen first-hand how the extreme gerrymandering of Chester County confused voters, stalled work to achieve policy reforms and collaborations, and made our efforts to access federal resources more difficult than necessary. And perhaps most problematic, it has contributed significantly to the current hyper-partisanship in Washington and across the nation.

As Committee members are well aware, the Pennsylvania Supreme Court has shown a willingness to intervene in the redistricting process to correct gerrymandering in our Congressional districts map. No doubt they will do the same in 2021 if the Legislature and the Governor cannot agree on a map that is based on the standards the Court applied in 2018 and that govern the redistricting process for state legislative districts. As the Pennsylvania Constitution requires for state maps, Justices will be expecting the Congressional map to be:

"composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township or ward, except where necessary to ensure equality of population."

Previous testimony submitted to this Committee on May 26, 2021 by Fair Districts PA representatives Patrick Beaty and Carol Kuniholm provided excellent insights on this issue and that the Committee ignores these Constitutional expectations at its own peril. I urge you to review this testimony including the Court's reasoning that these Constitutional standards can be "subordinated ... to extraneous considerations such as gerrymandering for unfair partisan political advantage."

Consequently, one of the best ways to immunize the new map against litigation is to adopt the principles outlined in the Legislative and Congressional Redistricting Act (Senate Bill 222). The bill sits in this Committee and would provide excellent protections by establishing a statutory prohibition against

gerrymandering. Again, I ask you to review the May 26 testimony presented by Fair Districts PA leaders about SB 222 which includes the following language in section 704 prohibiting undue partisanship:

“A congressional redistricting plan shall not purposefully or unduly favor or disfavor an incumbent elected official, candidate or prospective candidate for elective office. A redistricting plan on a Statewide basis shall not purposefully or unduly favor or disfavor a political party.”

SB 222 also includes other primary and secondary criteria worthy of your consideration in pursuit of a Congressional district map that is fair and in keeping with the Commonwealth’s Constitutional protections for racial and language minorities.

If the Committee chooses not to follow the values outlined in the Legislative and Congressional Redistricting Act (SB 222) when evaluating maps, you must share with the public the criteria and values you will use to evaluate them *before* maps are drawn and presented. To hide this crucial information from citizens is a signal that the Committee is paying lip-service to transparency in favor of secret deals that threaten our democracy.

Thus, in addition to banning the practice of gerrymandering, it is my belief that the following strategies and best practices would advance an equitable redistricting outcome:

- 1) When drawing districts, the Committee should start with a blank map with no predetermined lines or efforts to protect or punish sitting legislators. Our population has shifted so dramatically in the past decade that we can no longer play around the edges, particularly given that we are losing a seat in Congress. And do not use political data except to test that the districts are not inadvertently gerrymandered or at odds with the Voting Rights Act (VRA) and the Pennsylvania Constitution.
- 2) Speaking of the VRA, the Committee should consult publicly with experts on the best ways to ensure racial equity and adherence to the Voting Rights Act. Municipalities in my county such as Coatesville, Kennett Square, and Phoenixville should not be divided up to reduce their influence. Similarly, communities of color in other parts of the state, which according to the census account for much of Commonwealth population growth, must be treated fairly. And there are plenty of experts here in Pennsylvania who can provide guidance on this critical matter. Fair Districts PA can recommend some to you.
- 3) Despite the challenge of achieving population equality as mandated by the courts, please keep communities and counties whole unless absolutely necessary. As SB 222 would require, do not divide a county more times than the population warrants plus one. Also, you should provide a real explanation to the public if you decide not to do so and not just claim that population equality required it. Tell the public why the Committee split jurisdictions where you did rather than somewhere else. To that end, and based on its population and overlapping communities of interest, keep Chester County in one district.
- 4) Every effort should be made to prevent precinct splits which confuses voters and increases the possibility of mistakes. Therefore, while population equality is a critical value, it should not be used to justify splitting precincts. The Supreme Court has ruled [*Tennant v. Jefferson County Commission* (2012)] that variations in district populations are permissible as long as the state can demonstrate they were the result of specific policy objectives, such as keeping communities

and precincts whole. This is another reason to approve SB 222 which would place such redistricting policy goals in statute. For more information on how the Committee is misinterpreting population equivalency requirements see testimony to the House State Government Committee presented by Patrick Beaty, Legislative Director of Fair Districts PA, on October 28, 2021 and which follows my testimony below (Addendum 1).

- 5) Just as the Legislative Redistricting Commission addressed the practice of prison gerrymandering, you should resolve that the Congressional map count incarcerated persons in their home communities as statute provides [Title 25, § 1302 (a) (3)] (1). More than 1,000 Chester County residents incarcerated in prisons across the Commonwealth rely on their families and friends in our municipalities while receiving little or no support from the places they serve their time. Frankly, legislators whose districts host prisons often ignore requests for help from inmates. And now that the LRC has voted to count most prisoners in their home towns so should the Legislature. The Department of Corrections has the information and this is an adjustment the courts permit.
- 6) Be mindful of geographic features that represent natural borders for districts. In some regions that means running lines along a mountain ridge rather than over it and recognizing major rivers as natural boundaries. The Schuylkill River separating Chester and Montgomery Counties is an example of a local river boundary that matters.
- 7) Please consider communities of interest. For example, Chester County produces more mushrooms than anywhere in the world and its growers face unique challenges. It would make no sense to divide that largely local community of interest into multiple districts. Please use input like this as you set your mapping priorities.
- 8) You should use one or more widely accepted metrics to demonstrate the fairness of the proposed map. There are a number of good options including partisan bias, precinct and county splits, minority representation, and compactness.
- 9) Finally, while this redistricting process is more transparent than any other in my memory, more can be done. To that end, open up the mapping portal so citizens can submit maps that can be viewed by Committee members and the public. Also, the Committee should publicly share and accept suggestions on the proposed Congressional districts map before any vote occurs. Give the public at least four weeks to review the map and offer suggestions before its finalized. That means supplying the map in a format the public can understand along with information about the criteria used to draw it and which consultants drew it.

Thank you for giving me this opportunity to offer testimony. My hope is that you will adopt my recommendations. And thanks to you for your service and know that your work to ensure that our new Congressional district map is fair will help restore citizens' faith in our government.

- (1) The practice of counting individuals in places where they are incarcerated is contrary to Pennsylvania law [Title 25, § 1302 (a) (3)], which states clearly: *"no individual who is confined in a penal institution shall be deemed a resident of the election district where the institution is located. The individual shall be deemed to reside where the individual was last registered before being confined in the penal institution, or, if there was no registration prior to confinement, the individual shall be deemed to reside at the last known address before confinement."*

ADDENDUM 1

Testimony of Patrick Beaty, Legislative Director, Fair Districts PA Submitted to the Pennsylvania House Committee on State Government Public Hearing on Congressional Redistricting October 28, 2021

The following testimony summarizes the position of Fair Districts PA on population equality as a standard in redrawing congressional districts and its relationship to other criteria the General Assembly may consider in the redistricting process. Fair Districts PA is an all-volunteer, grassroots organization dedicated to reform of Pennsylvania's redistricting processes for both congressional and state legislative redistricting.

The U.S. Supreme Court has interpreted Article I, Section 2, of the U.S. Constitution to require that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders* (1964). However, the "one person, one vote" standard does not require absolute population equality when redrawing congressional districts. Rather, the Court described equal representation as a "fundamental goal," but one which may not be possible with mathematical precision.

The "as nearly as practicable" standard requires that a state make a good faith effort to achieve mathematical equality. The burden is on those challenging a congressional redistricting plan to demonstrate that population differences among districts could have been avoided and were not the result of a good faith effort to achieve equality. [*Karcher v. Daggett* (1983)]. However, proving the lack of a good faith effort does not by itself mean a redistricting plan is unconstitutional. What it means is that the burden of proof shifts to the state to prove "that the population deviations in its plan were necessary to achieve some legitimate state objective." The Court provided the following examples of "nondiscriminatory" state objectives that could justify minor population deviations:

Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, respecting the cores of prior districts, and avoiding contests between incumbent Representatives.

In *Karcher*, the Supreme Court rejected a New Jersey congressional redistricting plan in which the difference between the smallest and largest district populations was less than one percent (0.6984%) of the average district. The state argued that the deviation was necessary to achieve its goal of preserving the voting strength of racial minority groups. The Court did not dispute that New Jersey's claimed objective could be used to justify small variances in population. However, the state failed to document and prove that the population deviations in most of the congressional districts had any causal connection to protecting the voting strength of racial minority groups.

In 2002, a federal district court struck down Pennsylvania's congressional redistricting plan because the state failed to justify a deviation of 19 persons between the most populated and least populated districts. (*Vieth v. Pennsylvania*). The court found that the state could have easily produced a plan with zero deviation that met the claimed objective to avoid splitting precincts.

However, the Supreme Court has also upheld a deviation greater than the ones that failed in those earlier cases. In *Tennant v. Jefferson County Commission* (2012), the Court found a “small” deviation of 0.79% from the average was justified by West Virginia’s objectives to avoid splitting counties, to minimize population shifts between districts and to avoid contests between incumbents. The Court upheld the plan even though the commission had considered and rejected alternative plans with smaller population deviations. Those alternative plans did not perform as well as the approved plan with regard to the state’s other legitimate redistricting objectives.

It is clear then that this committee may consider established criteria other than population equality when drawing congressional districts. But courts will still look to determine whether the deviation from equal population was necessary to achieve the state’s other legislative objectives and whether the degree of deviation was reasonable under the circumstances.

If Pennsylvania’s 2021 congressional plan is challenged in court for violating the “one person, one vote” standard, the state will need to identify specific policy objectives the General Assembly had in mind when it approved the plan. The best evidence of legislative policy is, of course, a statute enacted by the General Assembly. Unfortunately, Pennsylvania is among the minority of states that have no statutory standards for drawing congressional district lines.

Most states have enacted specific criteria for congressional redistricting, either by statute or in their state constitution. According to research by the National Conference of State Legislatures, a majority of states require that congressional districts be compact (29 states), contiguous (32) and that they preserve political subdivisions (29). Pennsylvania is listed among those states as a result of the 2018 state Supreme Court decision in *League of Women Voters of PA v. Commonwealth of PA*. In *League of Women Voters*, the Court applied criteria mandated by the Pennsylvania Constitution for redistricting of state House and Senate districts, but never previously used to analyze a congressional plan.

States have also adopted a variety of other criteria to promote objectives like partisan fairness and protecting communities of interest. Both of those criteria are included in House Bill 22, the Legislative and Congressional Redistricting Act (or LACRA), which is currently awaiting action by this committee. HB 22 – introduced by Rep. Wendi Thomas with strong bi-partisan support – also contains a prohibition against splitting precincts and a specific and measurable limitation on the number of times a county could be divided in forming congressional districts.

Fair Districts PA recognizes that not everyone agrees with every aspect of the bill we have supported and that some may prefer other mapping criteria. There is still time to resolve those issues before voting on a congressional redistricting plan. We urge this committee to enact appropriate criteria that will then be used in crafting the final plan. Statutory mapping requirements will provide the legislative policy basis for mapping decisions you may wish to make that require some deviation from absolute population equality.