To: Jonathan Cervas, Ph.D.; Bernard Grofman, Ph.D.

From: Scott Matsuda

Date: 9/23/2022

Case Briefing **[Pennsylvania]**

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| **Citation** | * *Carter v. Chapman*, 270 A.3d 444 (Pa. 2022) (per curiam). |
| **Judicial Breakdown / Partisan or Nonpartisan** | * Baer, C.J. (D), issued the 4–3 opinion; Justices Donohue (D), Dougherty (D), and Wecht (D) joined the opinion.[[1]](#footnote-1)   + Justices Donohue, Dougherty, and Wecht filed concurring opinions.   + Justices Todd (D), Mundy (R), and Brobson (R) filed dissenting opinions. |
| **Procedural History** | * The matter commenced on 12/17/2021, when two separate petitions were filed.   + Carter Petitioners: Citizens registered to vote in PA.   + Gressman Petitioners: Citizens registered to vote in PA and “leading professors of mathematics and science[.]” * Petitioners claimed that the court’s congressional plan adopted in *LWV III* in 2018 (using 2010 census data) violated their state and federal rights to cast undiluted votes, because the 2018 Plan divided the Commonwealth into 18 districts—the 2020 census data reflected a population shift causing a loss of one congressional seat (to 17), which rendered the 2018 Plan malapportioned. * On 12/20/2021, the court consolidated the petitions. * By order dated 1/14/2022, the court granted intervenor status to a variety of petitioners, and required that each submit at least one congressional plan and a supporting brief and/or expert report.   + The court held hearings on 1/27 and 1/28, at which numerous experts testified. * By order dated 2/2/2022, the court granted the Carter Petitioners’ Application for Extraordinary Relief, and, following *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992):   + Designated a Special Master, the Hon. Patricia A. McCullough, who presided over the matter when the court assumed plenary jurisdiction; and   + Directed the Special Master to file a report containing proposed findings of fact and conclusions of law supporting her recommendation of a districting plan. * On 2/7/2022, the Special Master submitted her report.   + The Special Master received 13 plans to study, yet chose the plan created by the PA Legislature (H.B. 2146), which the Governor previously vetoed on 1/26/2022.     - H.B. 2146 was given preferential treatment because “it is the General Assembly’s prerogative, rather its constitutional mandate, to redraw the state’s congressional districts. . . .” * Various petitioners filed exceptions in the court challenging the Special Master’s decision, and argument was heard on 2/18/2022. |
| **Disposition** | * The PA primary and general elections for seats in the United States House of Representatives commencing in 2022 shall be conducted in accordance with the plan submitted to the Special Master by the Carter Petitioners. |
| **Facts** | * Due to a loss of population (relative to the nation), PA’s number of congressional representatives declined from 18 to 17, requiring a new congressional districting plan. * Because the General Assembly and the Governor failed to agree on a plan, the court was forced to create one. |
| **Issue(s) or**  **Question(s)**  **Presented** | * N/a. |
| **The Rule(s)** | * PA traditional districting principles *– League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (*LWV II*)   + Court uses traditional neutral criteria to determine a claim of congressional vote dilution under the Free Exercise Clause of the state charter.     - These traditional core criteria provide a “floor” of protection against the dilution of one’s vote and that the subordination of these criteria to extraneous considerations, such as partisan gerrymandering, is unconstitutional. *LWV II*, 178 A.3d at 817.   + Requires that congressional districts be compact, contiguous, as nearly equal in population as practicable, and which minimize divisions of political subdivisions, while taking into consideration the subordinate historical considerations, such as communities of interests, the preservation of prior district lines, and the protection of incumbents.     - Partisan fairness metrics provide tools for objective evaluation of proposed congressional districting plans, e.g., efficiency gap analysis, etc. * PA’s Free and Equal Elections Clause, Pa. Const., art. I, § 5.   + “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”   + Must not dilute the potency of an individual’s ability to select the congressional representative of his or her choice. *LWV II*, 178 A. 3d at 816. * Voting Rights Act, 52 U.S.C. § 10301. |
| **Holding(s)** | * N/a. |
| **Rationale** | * Court rejected the Special Master’s recommendation, focussing on 3 aspects of her analysis:   + (1) Partisan Advantage: Court rejected the Special Master’s conclusion that certain plans improperly yielded a partisan advantage to the Democratic Party contrary to Pennsylvania’s political geography.     - While discounting 6 maps due to the absence of a sufficient “Republican tilt,” the Special Master credited H.B. 2146 for the same attribute, observing that the Republican majority in the General Assembly “developed and proposed a plan, H.B. 2146, that favors Democrats, which ultimately underscores the partisan fairness of the plan.”       * Ultimately, consideration of partisan fairness, when selecting a plan among several that meet the traditional core criteria, is necessary to ensure that a congressional plan is reflective of and responsive to the partisan preferences of the Commonwealth’s voters.   + (2) Population Deviation: Court rejected the Special Master’s finding that certain plans failed to achieve a maximum population deviation of one person.     - While the districts in most of the plans deviated by only one person, the two discounted plans deviated from the ideal district population of 764,865 by plus one person or minus one person.     - It was improper to discredit these two plans without considering the reasons for the minor deviation.   + (3) Preferential Treatment of H.B. 2146: Court rejected the Special Master’s preferential treatment of H.B. 2146.     - To the extent that the Special Master’s recommendation was premised upon bestowing H.B. 2146 preferential treatment simply because it had made it partway through the legislative process, [the court] reject[s] her endorsement of this plan on this basis alone.     - This case is also distinguished from *Upham* which the Special Master relied upon because here, the Governor vetoed the plan.       * Special Master improperly elevated the General Assembly’s role in passing legislation over that of the Executive Branch, departing from checks and balances. * Although the redistricting of congressional districts falls squarely within the purview of the General Assembly, U.S. Const., art. I, § 4, cl. 1, the court had “fulfilled [its] obligation to select a redistricting plan only because the Legislature was unable to do so.”   + “Having been thrust into the position of choosing a redistricting plan due to the political stalemate between the Legislature and the Governor, we applied the aforementioned designated criteria and considerations and selected the Carter Plan.” * The court did not select the Carter Plan because it utilized the least change approach (although that was deemed a reasonable starting point) but because the least change approach “worked in this case to produce a map that satisfies the requisite traditional core criteria while balancing the subordinate historical considerations and resulted in a plan that is reflective of and responsive to the partisan preferences of the Commonwealth’s voters.”   + The 17 districts are contiguous;   + Although slightly less compact than other plans due to the plan’s favorable consideration of existing political subdivisions (e.g., keeping Pittsburgh within a single district), such a reason is sufficiently justifiable;   + The plan was equipopulous, having a maximum deviation of two persons, and satisfies the constitutional requirement of achieving equal population “as nearly as is practicable.”     - Even if challenged in arguendo, the plan would be sufficiently justified, because attempts to reach zero deviation required not only the manipulation of several census blocks, but a split between Districts 3 and 5 in South Philadelphia.     - The plan represents a good-faith effort, and the deviation was solely to limit the number of splits.   + While the court did not opine as to which type of political subdivision was preferable (i.e., county, city, incorporated town, borough, township, or ward), the court merely observed that the Carter Plan “was one of the best in terms of keeping counties whole and falls within all other ranges of the plans submitted.”   + Regarding subordinate historical considerations, the Carter Plan sufficiently considered communities of interest, “lap[ped] the field” in preserving prior districts, paid due consideration to incumbents (the two incumbents paired in District 15 were necessitated by the population shift), and was deemed fair based on various partisan fairness metrics (e.g., Majority Responsiveness, Efficiency Gap, & Mean-Median).   + Lastly, while a VRA analysis was not performed, the existing 2 majority-minority districts were the same as in the 2018 Plan and had not been challenged as violative of the VRA. |
| **Arguments of Parties** | * N/a. |
| **Concurring: Donohue, J.** | * Agrees with the selection of the Carter Plan, and joins in the Majority’s analysis, including its invocation of partisan fairness as a factor in its selection.   + In this circumstance, the logic of *LWV* compels the court to consider the degree of partisan fairness among the plans.   + Partisan fairness is not merely a subordinate factor to be considered.     - “When, as here, all of the plans are compliant with the floor criteria, consideration of the degree of partisan fairness must, in my view, drive the ultimate selection of a plan in the circumstances in which this Court finds itself.”   + The lack of one perfect test for measuring partisan fairness does not preclude the court from considering that factor.     - It simply means that it should look for the most comprehensive review available. |
| **Concurring: Dougherty, J.** | * Joins the majority opinion, but distances from certain aspects of part VI.B.   + Although the majority lands on the right answer, it fails to satisfactorily explain how it reaches that result.   + “In my view, the critical factor that sets the Carter Plan apart—the ‘tie-breaker,’ so to speak—is that the Carter Plan yields the least change from the Court’s 2018 congressional redistricting plan.” |
| **Concurring: Wecht, J.** | * Writes separately to “further explain why [he] found a number of exceptions to the Special Master’s Report and Recommendation to be meritorious, and also to offer a more detailed discussion regarding the ‘least-change’ approach, the ‘subordinate historical consideration’ that tipped the scales in favor of the Carter Plan.”   + “Although I would not declare that least-change should be the ‘tie-breaker’ for all court-selected plans, my views on this subject align more closely with Justice Dougherty’s.”   + “[W]e should endeavor to resolve redistricting disputes by elevating as many ‘objective’ criteria above ‘subjective’ considerations as possible. To that end, I consider a plan’s least-change score to be a weighty plus-factor. . . .” |
| **Dissenting: Brobson, J.** | * The Carter Plan fails the *Karcher* test[[2]](#footnote-2) by providing for a two-person population deviation between the largest and smallest congressional districts.   + “While I acknowledge that it is mathematically impossible to create 17 districts of precisely equal population, it is possible, with good faith, to craft a plan with less than a two-person deviation”     - Only 2 out of the 13 maps proposed a deviation of more than one person; the Carter petitioners also noted in their brief that they could have created a plan with a one-person deviation.     - Unlike the *Mellow* Court, the majority has made no attempt to evaluate whether the Carter Plan performs superiorly with respect to splits of VTDs when compared to the 11 other plans that achieved only a one-person deviation, but simply accepts that avoiding the split of just one additional VTD constitutes a legitimate state interest.       * Conversely, the Carter Plan also is the only plan that splits the City of Williamsport--no legitimate state interest can be found in this tradeoff. * Separately, the current matter before this Court, however, is not a partisan gerrymandering case.   + No one in this litigation has challenged any of the proposed plans as an unconstitutional partisan gerrymander under *LWV II*.   + Thus, wading into the political thicket is “subjective, partisan, and quintessentially political inquiry that belongs in the political branches of our government, not in the courts.”     - *LWV II* should not embolden the court to choose the “fairest map of them all.”     - It would have been preferable to adopt the least-change approach “instead of using unquestionably partisan constructs to justify its selection. . . .”   + “Where the judiciary is forced to adopt a legislative reapportionment plan, the court should hew closely to nonpartisan standards (e.g., compactness, contiguity, minimizing splits, etc.) or nonpartisan methods (e.g., the “least-change” approach), eschewing partisan considerations or partisan approaches.” |
| **Dissenting: Mundy, J.** | * As to the question of how to determine which of the proffered maps best complies with the Constitution’s neutral factors after eliminating any maps that fail to meet the constitutional floor, he suggests considering two observations:   + (1) the maps can be analogized to candidates in an election where each criterion by which they are judged is the equivalent of an individual voter taking part in a ranked-choice voting exercise; and   + (2) ranked-choice voting can be accomplished through pairwise comparisons of the candidates, in this case, the candidate maps. * He would hold that this Court should rank and score all proposed maps according to each of the individual quality metrics and select the map with the highest total weighted score. The process entails five steps:   + (1) eliminate any map which fails to meet the constitutional “floor” or which violates federal law; then as to each of the remaining maps:   + (2) compute raw scores for each map for each individual quality metric using pairwise comparisons and Borda count;   + (3) compute weighted scores for each map for each individual quality metric by multiplying the raw scores by the weight for that individual quality metric;   + (4) compute the total weighted score for each map by summing all weighted scores for that map; and   + (5) select the map with the highest overall weighted score. * Thus, with Dr. Duchin’s data the DRAW-LINES map was the top scorer, with RESCH-1 as the runner-up.   + As between those two maps, however, only RESCH-1 keeps Pittsburgh whole, whereas DRAW-LINES splits it in two.     - “I would conclude that the RESCH-1 map should be chosen regardless of which data set is used.”   + “In all events, the CARTER map does not come close to rising to the top of the pack.” |
| **Dissenting: Todd, J.** | * “[B]ased on my analysis of the neutral constitutional criteria we set forth in *LWV II*, I would select the plan developed by the “Gressman Math/Science” Petitioners—the “Gressman Plan”—as I consider it to most closely adhere to those neutral standards.”   + The court need rarely to “look beyond the constitutionally-specified neutral criteria” to assess the subordinate considerations.   + “In my view, assessment of subordinate or secondary considerations such as partisan fairness, or whether a plan represents the least change from a prior congressional districting plan, is necessary *only* when a court must choose among various plans that are equal with respect to their compliance with the core criteria. Where, however, one plan is superior to all others, as measured by the closeness of its adherence to these criteria, I find it unnecessary for a court to consider the subordinate considerations.” |
| **Notes/**  **Reactions** | * N/a. |

1. The political party designations of the judges were obtained via Google desktop searches, which may not be entirely accurate. [↑](#footnote-ref-1)
2. The first question asks whether the population differences could practicably have been avoided through good-faith effort. *Karcher*, 462 U.S. at 730. If so, the second question asks whether the differences were nonetheless necessary to achieve a legitimate state objective. Tennant, 567 U.S. at 760 (citing *Karcher*, 462 U.S. at 740-41). [↑](#footnote-ref-2)