IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 184 M.D. 2020

ROBERT L. HOLBROOK, *et al.*,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,

Respondents

BRIEF FOR *AMICI CURIAE* THE MAJORITY LEADER AND REPUBLICAN CAUCUS OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENTS' PRELIMINARY OBJECTIONS

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CASE BACKGROUND AND INTEREST OF *AMICUS CURIAE*

The Petitioners are challenging the Commonwealth's legislative districting plan for the General Assembly ("state districting plan") because it involves the "practice of counting incarcerated people as electoral residents of the correctional facilities where they are…imprisoned rather than as electoral residents of their pre-incarceration communities[.]" Petition for Review at ¶ 1. Petitioners contend that, in light of this "practice," the districting plan violates Article I, Section 5 and Article II, Section 16 of the Pennsylvania Constitution, along with the provision in the Election Code at 25 Pa.C.S. § 1302(a)(3). *Id*. at ¶¶ 8, 11-13, 154, 163, 165. Petitioners ask this Court to declare the districting plan unconstitutional, declare "that any future apportionment plan for the Pennsylvania General Assembly…must count imprisoned persons as residents of their pre-incarceration homes or last known (residential or voter registration) addresses" and enjoin the Respondents from "approving any future apportionment plan" that does not count imprisoned people in this manner. *Id*. at ¶ 166 (Prayer for Relief).

The Majority Leader of the Pennsylvania House of Representatives ("House Majority Leader") and House Republican Caucus ("Caucus") believe that, on the merits, the Petitioners' claims are flawed. Simply put, for purposes of creating a state districting plan, the Pennsylvania Constitution does ***not*** require prisoners to be counted as residents of their pre-incarceration homes, as opposed to the correctional

facilities where they are imprisoned. But the merits of Petitioners' claims are not properly before this Court. As the Respondents correctly explain in their preliminary objections to the Petition for Review, the "Petitioners have sued (i) the wrong parties, (ii) at the wrong time, and (iii) in the wrong court." Preliminary Objections (May 11, 2020) at ¶ 5.

The Petitioners, in this regard, sued three Respondents in total – the Commonwealth, Governor, and Secretary of State. But none of those Respondents created the current state districting plan and none of them will create any "future apportionment plan." Petition for Review at ¶ 166 (Prayer for Relief). Instead, under Article II, Section 17 of the Pennsylvania Constitution, it is the Legislative Reapportionment Commission ("Commission") that created the current plan and will create each of the future plans. *See* Pa. Const. art. II, § 17. The Commission is a body that is constituted "[i]n each year following the year of the Federal decennial census…for the purpose of reapportioning the Commonwealth." Pa. Const. art. II, § 17(a). The Commission is therefore not in existence at this time. When it ***is*** in existence, however, it is made up of five members – including the House Majority Leader – none of whom is named as a Respondent here. *See* Pa. Const. art. II, § 17(b).

Article II, Section 17, in addition, establishes the exclusive and mandatory procedure for judicial review of any state districting plan that the Commission

adopts. The procedure is that, after the Commission has adopted the plan in final form, any aggrieved person has 30 days to appeal from the plan directly to our Supreme Court. Pa. Const. art. II, § 17(d). But the Petitioners are challenging the current state districting plan ***long after*** the applicable 30-day period expired and they are doing so in this Court, not the Supreme Court. And, to the extent that the Petitioners are challenging a future state districting plan, they are doing so ***long before*** the Commission will adopt the plan and therefore long before the applicable 30-day period will begin to run. And again, they are asserting the challenge in this Court, not the Supreme Court.

Because the House Majority Leader is one of the five members of the Commission when it ***is*** constituted, he and the Caucus have a significant interest in the issues that are at the core of this matter. From a procedural perspective, the House Majority Leader and Caucus have an interest in ensuring that the Judiciary upholds and affirms the exclusive and mandatory procedure for judicial review of state districting plans – a procedure that, in this case, the Petitioners have failed to follow in every respect.

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

ARGUMENT

Article II, Section 17 of the Pennsylvania Constitution establishes a procedure for challenging state districting plans that the Commission adopts. *See* Pa. Const. art. II, § 17(d). This procedure is exclusive and mandatory. It exists in order to ensure that challenges to a state districting plan are resolved expeditiously and that, once the challenges have been resolved, the plan becomes unassailable – creating certainty regarding state district boundaries throughout the plan's duration.

Article II, Section 17(d) states, in particular, that "[a]ny aggrieved person may file an appeal from the [Commission's] final plan directly to the Supreme Court within 30 days after the filing thereof." Pa. Const. art. II, § 17(d). Article II, Section 17(e), in turn, provides that "[w]hen the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan *shall have the force of law* and the districts therein provided *shall be used thereafter* in elections to the General Assembly *until the next reapportionment* as required under this section 17." Pa. Const. art. II, § 17(e) (emphasis added). In other words, an aggrieved person has 30 days to file an appeal from the final state districting plan and, after the appeal process has run its course, the plan gains the "force of law" and "shall be used thereafter" until the Commission reapportions the Commonwealth again. These factors signal that the Article II, Section 17 procedure for judicial review of a state districting plan is exclusive and

mandatory. Indeed, if a person was permitted to commence and prevail on a challenge to a final plan ***after*** the applicable 30-day appeal period had expired, which resulted in a re-configuration of the plan, the Article II, Section 17 process would have run its course and yet the plan would not "be used thereafter" until the Commission reapportioned the Commonwealth again. *See* Pa. Const. art. II, § 17(e). The plan, instead, would have been ***changed*** during the interim period, contrary to the plain text of the Constitution. *See Commonwealth v. Isaac*, 397 A.2d 760, 765 (Pa. 1979) ("[Constitutional provisions] must be given the ordinary, natural interpretation the ratifying voter would give them."). By definition, a particular plan is not "used thereafter…until the next reapportionment" if it is ***changed*** before the next reapportionment.

In this way, Article II, Section 17 is like certain statutory provisions that provide for administrative and judicial review of administrative agency decisions. As this Court has observed, "where a statutory remedy exists," that remedy "is exclusive" unless another procedure "is preserved thereby." *Lashe v. Northern York County Sch. Dist*., 417 A.2d 260, 264 (Pa. Cmwlth. Ct. 1980); *see also id.* at 263 ("A non-exclusive or permissive statutory remedy" exists only "where the Legislature specifically provides that a person may proceed under the statute ***or*** may go to the courts.") (emphasis added).

The Environmental Hearing Board Act ("EHB Act"), as one example, provides that the Department of Environmental Protection "may take an action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A, but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board….If a person has not perfected an appeal in accordance with the regulations of the [Environmental Hearing Board], the department's action shall be final as to the person." 35 P.S. § 7514(c). The Board's regulations, in turn, establish a 30-day appeal period, which begins to run at a defined point after the Department takes the action at issue. *See* 25 Pa. Code § 1021.52(a). In addressing this regime, our Supreme Court concluded that it establishes a review procedure that is exclusive and mandatory and that, as a result, an action by the Department cannot be challenged through a different procedure, "no matter how incorrect" the action might have been:

> Nonetheless, the letter constituted a decision by DER [the predecessor to the Department of Environmental Protection] essentially in the nature of granting a license or permit. Notice was properly sent to Appellants (potentially aggrieved persons) and to Appellant's attorney, the Township Solicitor. If they had any quarrel with the result, Appellants had thirty days to appeal to the EHB under 35 P.S. § 7514(c) and 25 Pa.Code § 21.52(a) (both sections are referred to above). They failed to do so. ***After the time for appeal had passed, the DER decision became final and no matter how incorrect it might have been, Appellants were bound by it***. We realize, of course, that Appellants were not in any formal sense "parties" to the DER determination here and that DER did not conduct

> a hearing. Nevertheless, to hold that they had no opportunity or right to appeal because they were not parties to a proceeding would emasculate the statutory scheme at issue in this litigation. Under it, the EHB conducts hearings, not the DER. If the DER makes a decision and sends notice to an aggrieved person, that person must appeal to the EHB within the time limits allowed. ***Appellants failed to file a timely appeal here and will not now be heard to challenge the substance of the DER's decision set forth in the December 1, 1989 letter***.

Otte v. Covington Twp. Road Supervisors, 650 A.2d 412, 414-15 (Pa. 1994) (emphasis added).

The Supreme Court later re-affirmed this point, stating that "[p]ursuant to the Environmental Hearing Board Act, 35 P.S. § 7514(c), the failure to appeal within thirty days rendered DEP's action final" and that a township, which had failed to appeal within the applicable 30-day period, was therefore "foreclosed from challenging that [DEP] directive before the statutorily-appointed administrative tribunal, the EHB, and exercising the appeal right provided in Article V, Section 9 of the Pennsylvania Constitution." *Dep't of Envtl. Protection v. Cromwell Twp.*, 32 A.3d 639, 652-53 (Pa. 2011).

From a procedural perspective, Article II, Section 17 is materially indistinguishable from the EHB Act regime. As with the EHB Act regime, Article II, Section 17 establishes a 30-day period during which an aggrieved person may appeal an action to a given tribunal. *See* Pa. Const. art. II, § 17(d). And, as with the

EHB Act regime, after the appeal process has run its course, Article II, Section 17 establishes that the action becomes "final" – or, in the parlance of Article II, Section 17, the action (*i.e.*, the state redistricting plan) gains the "force of law" and "shall be used thereafter…until the next reapportionment[.]" Pa. Const. art. II, § 17(e). It follows that, as with the EHB Act, once "the time for appeal had passed" under Article II, Section 17, the Commission's state districting plan "became final and no matter how incorrect it might have been," any parties who claim to be aggrieved by it, including the Petitioners, "were bound by it." *Otte*, 650 A.2d at 414-15. Under Article II, Section 17, a different procedure, like the one that Petitioners are attempting to use in this case, is simply ***not*** "preserved thereby." *Lashe*, 417 A.2d at 264.

This point finds additional support in the constitutional history that pertains to Article II, Section 17. *See Pa. State Ass'n of Cnty. Comm'rs v. Commonwealth*, 52 A.3d 1213, 1228 n.11 (Pa. 2012) ("legislative and constitutional history is a matter of public record, and, if deemed germane to our review, may properly be consulted").

To this end, the provisions in Article II, Section 17 that govern judicial review of state districting plans were added to the Pennsylvania Constitution in 1968. As part of the 1967-1968 Constitution Convention that precipitated the citizens' adoption of those provisions, the Committee on Style and Drafting, comprised of a

collection of delegates to the Convention, made several substantive recommendations to the full Convention. In making one of those recommendations, the Committee first observed that, under Article II, Section 17, a state districting plan would become "final in one of three ways." *Debates of the Pennsylvania Constitutional Convention of 1967-1968* ("*Debates*") (published Dec. 1969), Vol. II at 1160. The Committee was referencing the fact that, after the Commission files a final plan, the plan gains "the force of law" when (i) "the Supreme Court has finally decided an appeal" or (ii) "when the last day for filing an appeal has passed with no appeal taken" and that (iii) otherwise, if the Commission fails to file a "preliminary, revised or final reapportionment plan…within the time prescribed by this section" (and the time has not been extended "for cause shown"), the "Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth." Pa. Const. art. II, § 17(e) & (h). Importantly, the Committee then emphasized that this framework was designed to facilitate "***all*** judicial proceedings as necessary" in connection with a state districting plan (and to likewise ensure that those proceedings would be completed before the primary elections in the first even numbered year after the federal decennial census):

> C. Effective date. Section 17 provides that a reapportionment plan becomes final in one of three ways. As the substantive committee rightly notes, the time schedule set forth in Section 17 is designed to accomplish the reapportionment, ***including all judicial proceedings as necessary*** prior to the primary elections in the first even

> numbered year after the Federal decennial census has been officially reported.

Debates, Vol. II at 1160 (emphasis added).

Later, Delegate Johnson, the Chairman of the Committee, made the same point as he addressed the full Convention. *See id.* at 1182. And, throughout the Convention, none of the delegates ever questioned this point or otherwise suggested that the Article II, Section 17 procedure for judicial review of state districting plans is anything other than exclusive and mandatory.

Along similar lines, Delegate Baldrige, speaking on behalf of the Convention's Legislative Reapportionment Committee, which drafted the language that became Article II, Section 17, explained that the procedure for judicial review of state districting plans was designed to ensure that, by the first even numbered year that follows the federal decennial census, candidates for legislative office "would know their districts…so they could know where they were campaigning":

> We were watching at all times the time schedule so that after the reapportionment was made the new legislators and senators who had to run in 1972, 1982, and so forth, would know their districts by January 1 or that year so they could know where they were campaigning. The time schedule was a little tight because we had to permit, first, the commission to file a report and give it 30 days for appeals to be filed to it or correct its own errors, and then, if it did not satisfy all the appeals, we gave it 30 days to hear the arguments and decide the appeals. That ran us clear up to September 15. Further, we allowed a period of 30 days for an appeal to the Supreme Court, which is normal time. The Supreme Court has, historically, always

> considered such cases as this emergency cases any they allow them to be argued first and very quickly after they are filed and make their decision very quickly.

Debates, Vol. I (Dec. 1969) at 533. This process, in other words, was designed to create certainty regarding state district boundaries throughout the duration of a state districting plan. Once the Article II, Section 17 process has run its course, the plan is final and unassailable until the next reapportionment occurs.

All told, Article II, Section 17 establishes that, after the Commission has adopted a state districting plan in final form, any aggrieved person has 30 days to appeal from the plan directly to our Supreme Court. Pa. Const. art. II, § 17(d). And, "[w]hen the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken," the plan gains "the force of law" and "shall be used thereafter" until the Commission reapportions the Commonwealth again. Pa. Const. art. II, § 17(e). As explained above, this procedure is exclusive and mandatory. And yet, here, in challenging the current state districting plan, the Petitioners failed to follow it in every respect. Instead of taking an appeal of the plan, with the Commission as the counter-party, they sued the Commonwealth, Governor, and Secretary of State. Moreover, they are challenging the plan long after the applicable 30-day appeal period expired and are doing so in this Court, not the Supreme Court. And, to the extent that they are challenging a future state districting plan, they are doing so long before the Commission will adopt the plan and therefore

long before the applicable 30-day period will begin to run. And once again, they are asserting the challenge in this Court, not the Supreme Court.

The Respondents are therefore correct that the "Petitioners have sued (i) the wrong parties, (ii) at the wrong time, and (iii) in the wrong court." Preliminary Objections (May 11, 2020) at ¶ 5. The Petition for Review should be dismissed.

CONCLUSION

The Court should grant the Respondents' preliminary objections and dismiss the Petition for Review.

Respectfully submitted,

July 16, 2020

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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 *Amici Curiae* complies with the word-count limit described in Pennsylvania Rule of Appellate Procedure 531(b)(3).

/s/ Anthony R. Holtzman
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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
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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

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