

IN THE SUPREME COURT OF PENNSYLVANIA

Kerry Benninghoff, individually,	:	
and as Majority Leader of the	:	
Pennsylvania House of	:	
Representatives,	:	
	:	
Petitioner,	:	No. 11 MM 2022
	:	
v.	:	
	:	
2021 Legislative Reapportionment	:	
Commission,	:	
	:	
Respondent.	:	

**ANSWER OPPOSING PETITIONER’S APPLICATION
FOR ORDER STRIKING EXPERT REPORTS**

The Court should deny Petitioner’s Application, because:

1. In a noteworthy exhibition of “do as I say, not as I do,”

Petitioner Benninghoff attached additional expert reports to his Petition for Review, and then also attached three affidavits to his brief, but now

complains because the Commission and Leader McClinton responded in kind.¹

2. Petitioner requests this Court to strike expert reports by Dr. Kosuke Imai, Dr. Matt Barreto, and Dr. Jonathan Rodden, submitted both by Leader McClinton and by the Commission, on the basis that they were not submitted to the Commission, because they relate to the Final Plan.² But Petitioner's extra materials *also* were not submitted to the Commission, because they relate to the Final Plan.

3. The Commission did not seek to strike the affidavits and new expert reports that Petitioner Benninghoff included with his Petition and brief, even though those materials were not part of the administrative record.

¹ Notably, the Commission filed its Answer, with the supplemental expert reports attached, in response to each of the nine Petitions for Review challenging the Final Plan. Only Petitioner Benninghoff has objected and moved to strike the reports, and he did so only in his appeal.

² Petitioner Benninghoff does not seek to strike the expert report of Dr. Christopher Warshaw, which was also attached to Leader McClinton's and the Commission's Answer.

4. Petitioner Benninghoff's extraneous materials not only are legally insufficient to alter the result, but the expert reports, like the original reports they purport to update, are so lacking in credibility and substantive reasonableness that they are vulnerable to the devastating reports that Leader McClinton attached to her Answer to the Petition as intervenor, and that the Commission also adopted as part of its Answer. That is the real reason for the Application to Strike.

5. The new reports by Dr. Imai and Dr. Barreto are updates of their reports previously submitted to the Commission and included in the administrative record. In that respect, the reports are indistinguishable from the updated reports that Petitioner Benninghoff attached to his Petition.

6. In other words, by attaching updated reports to his Petition, Leader Benninghoff opened the door to the Commission and Leader McClinton doing the same.

7. Further, the concepts of administrative agency review relied on by Petitioner Benninghoff do not map neatly onto appeals from the Commission's Final Plan.

8. The structure of Article II, § 17 of the Pennsylvania Constitution provides no mechanism for a record to be made after adoption of the Final Plan, especially where, as happened here, the Final Plan implemented comments suggested by the public in the exceptions period following the Preliminary Plan's release.

9. The Court likely recognized this structural difference in adopting Pennsylvania Rule of Appellate Procedure 1516(a), which allows for an answer to Petitions for Review challenging the Commission's Final Plan, in contrast with other appellate petitions for review, where no answer is allowed. In other words, a major purpose of an Answer by the Commission would be to bring the Court's attention to things that relate to the Final Plan in circumstances like those here.

10. The Commission's Answer, and the supplemental reports that the Commission attached to that Answer, are particularly important

because of the extent to which Petitioner Benninghoff relies on the new report from Dr. Barber in his Petition for Review.

11. To the Commission's knowledge, no one has been able to replicate the findings of Dr. Barber in regard to his simulations. This non-replicability is highly unusual because most academics want others to be able to replicate their results, so that their conclusions can be verified. *See Palazzolo v. Hoffman La Roche, Inc.*, 2010 WL 363834, at *5 (N.J. Super. App. Div. Feb. 3, 2010) (explaining that “[a]n expert’s scientific peers cannot fairly judge the expert’s written work, including whether it is worthy of publication, if his article does not accurately represent either the underlying data or what the author did to produce his results,” and agreeing that the absence of that information makes the expert’s opinion not “soundly and reliably generated”). Dr. Barber has taken the opposite approach by failing to disclose in either of his reports the exact algorithm, constraints, or parameter values used in his analysis. Dr. Barber’s omissions raise concerns about why, precisely, he does not want anyone to know his inputs.

12. Instead of verifying Dr. Barber’s results, the expert reports submitted by Leader McClinton contradict the findings of Dr. Barber.

13. Moreover, they contest his definition of “bias” and “fairness” as it relates to redistricting plans. The Chair’s Report points out that “*not one* of [Dr. Barber’s] 17,537 simulations has as few split municipalities as the Commission’s Final Plan. . . . This also raises questions about his methodology.”³ (Report 55 n.23.) The expert reports by Dr. Imai and Dr. Rodden address these shortcomings in Dr. Barber’s simulations.

A. Dr. Imai’s Supplemental Report.

14. Dr. Imai’s supplemental report echoes many of the same themes from his original report and testimony—and therefore is not a 180-degree “flip-flop,” as Petitioner claims. Indeed, one of Dr. Imai’s key conclusions in his January 7, 2022 statement to the Commission is reinforced in his revised report: “The key implication is that analysts must

³ See also *Common Cause v. Lewis*, 2019 WL 2469584, at ¶¶ 631-32 (N.C. Sept. 3, 2019) (noting Dr. Barber’s conclusions were unpersuasive and gave them little weight, in part because “none of Dr. Barber’s academic research or published articles concern redistricting or North Carolina”).

carefully choose the inputs to redistricting simulation algorithms based on legal considerations.” (Imai Report, C.R.⁴ Tab 34c, at 1083). In both his January 14, 2022 written report and his revised report attached to the Commission’s and Leader McClinton’s answer, Dr. Imai raises questions about Dr. Barber’s inputs into these redistricting simulation algorithms. And in all of his submissions, Dr. Imai explains that he is unable to replicate Dr. Barber’s findings.

15. Further, Dr. Imai’s supplemental report responds to a particular critique leveled at him by Dr. Barber. In his revised report, Dr. Barber suggests that Dr. Imai may have mis-specified the inputs of his algorithm. (Benninghoff Br., App’x A, 0013a n.6.) He further says, “Dr. Imai’s simulations also contain many more municipal splits than the Commission proposal or my simulations.” (*Id.*)

⁴ C.R. stands for the Commission’s Certified Record.

16. In his supplemental report, Dr. Imai adjusted his algorithm to produce a set of simulations that more closely mirrored the Commission's Final Plan.

17. Moreover, Dr. Imai's supplemental report repeats criticisms of Dr. Barber's conclusions by other experts who offered testimony that is in the Commission's record, that the Commission considered, and that this Court should consider as well.

18. On February 14, 2022, Fair Districts PA submitted a report to the Commission with a simulation created by Dr. Constantine Gonatas. (C.R. Tab 37f.) Dr. Gonatas produced two sets of 480,000 alternative plans. In the set of simulations where he constrains the number of county and municipality splits to levels similar in the Commission's Preliminary (and now Final) Plan, Dr. Gonatas's simulations produce very similar results to those produced by Dr. Imai in his supplemental report.

19. Finally, Petitioner Benninghoff's statement that Dr. Barber's updated report is different in kind from Dr. Imai's supplemental report is misleading. Dr. Barber added entirely new sections to his report

addressing race in redistricting—likely in an attempt to rebut Dr. Imai’s initial findings. If it was not objectionable to Petitioner Benninghoff to allow Dr. Barber to rebut Dr. Imai’s findings, it similarly should not be objectionable to allow Dr. Imai to rebut Dr. Barber’s findings.

B. Dr. Rodden’s Report.

20. The expert report prepared by Dr. Rodden is particularly devastating to the Petitioner’s argument. First, he clarifies the well-accepted standard notion of bias or fairness in the academic literature. Dr. Rodden describes bias as a technical term in the literature, which is consistent with the working definition used by Dr. Warshaw in his expert report.⁵

⁵ Dr. Warshaw writes of Dr. Barber’s working definition of bias and fairness: “This is not accurate. I do not know of any peer-reviewed study that has argued simulations should be used as the primary tool to evaluate the fairness or legality of a plan that does not otherwise provide either party an advantage according to generally accepted partisan bias metrics. Notably, Professor Barber’s report does not provide any academic citations for his assertion that simulations should be the sole benchmark of bias in a districting plan. In fact, Katz, King, and Rosenblatt (2020, 176) argues that ‘purely relative measures’ from simulations have ‘little value’ for this purpose.” (Warshaw Supplemental Report 6 (internal citations omitted)).

21. Dr. Rodden confirms that the “Final House Plan is, in fact, biased in favor of the Republican Party, not the Democratic Party” (Rodden Report 2.) He opines that Dr. Barber’s case studies of medium-sized cities “fail to generate any evidence that the traditional redistricting criteria outlined in the Pennsylvania Constitution have been subverted in favor of partisan goals.” (*Id.*).

22. Most importantly, Dr. Rodden rejects Dr. Barber's characterization of his work, included in Dr. Barber’s updated report, calling it “misleading.” (*Id.* at 7.) Indeed, Dr. Rodden makes clear that “[n]owhere does [my] book claim that it is universally impossible, or even difficult, to draw fair redistricting plans that respect traditional redistricting principles.” (*Id.* at 9.)

23. He continues: “But the main question is empirical rather than theoretical: Does Dr. Barber provide any evidence of pinwheels, pie-slices, or non-compact, ambling districts that contradict traditional redistricting principles to favor Democrats?” (*Id.*)

24. The answer, as Dr. Rodden shows, is clearly no. In fact, “[t]he Final House Plan is more compact, and splits fewer municipalities, than any of [Dr. Barber’s] simulated plans.” (*Id.* at 10.)

25. The report by Dr. Rodden, while new in the sense that he did not submit a prior report to the Commission, is analogous procedurally to the report that Petitioner Benninghoff previously had included from Dr. Katz.

26. Petitioner Benninghoff originally indicated that Dr. Katz would be presented as a witness, but then failed to produce a timely report from Dr. Katz or make him available for questioning. (March 4, 2022 Report of Mark A. Nordenberg, Chair of the 2021 Legislative Redistricting Commission, at 41.) Nevertheless, in an eleventh-hour about-face, Leader Benninghoff sought to introduce the previously-undisclosed report from Dr. Katz into the record, notwithstanding Dr. Katz’s failure to present testimony and be subject to examination. (*Id.*) In the interest of openness, the Chair accepted Dr. Katz’s report. (*Id.*)

27. Dr. Katz then provided a supplemental report, which was attached to Leader Benninghoff's Petition.

28. Petitioner Benninghoff's argument that Dr. Rodden's report should be stricken, in part because he was not offered as a witness during the Commission's hearings and because he was not subject to examination, rings hollow because of Petitioner Benninghoff's own conduct in presenting and relying upon two reports from an expert who was not offered as a witness and was not subject to examination.

29. Further, including Dr. Rodden's report is consistent with the goals of the Commission, and the Chair in particular: "to facilitate what will be a good reapportionment result for the people of Pennsylvania." (Chair Nordenberg's Statement, C.R. 25b, at 6-7.) Adhering to overly formalistic rules, or working only to ensure a fair fight between the political parties, can get in the way of this ultimate objective.

30. In the alternative, if the Court concludes that it is not appropriate to include Dr. Rodden's report as expert material attached to the Commission's Answer, the Commission requests that the Court instead

treat Dr. Rodden’s submission as the equivalent of an amicus curiae brief, because:

(a) Pennsylvania Rule of Appellate Procedure 531 allows “any non-party interested in the questions involved in any matter pending in an appellate court” on the merits to file an amicus brief.

(b) This Court regularly accepts amicus briefs from experts with special knowledge about complex, scientific or technical issues that are before the Court. For example, this Court accepted and cited to amicus briefs from experts in *Briggs v. Southwestern Energy Production Co.*, 224 A.3d 334, 338 n.4, 349 (Pa. 2020) (citing amicus briefs by Thomas D. Gillespie and Professor Terry Engelder).

(c) This Court has accepted and cited to expert amici in cases involving redistricting. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 796-97 (Pa. 2018) (detailing arguments of political science professors).

(d) Amici have attached expert reports in this case, which Petitioner Benninghoff has not moved to strike. *See Br. of Amicus*

Concerned Citizens for Democracy; Br. of Amici NAACP Pennsylvania State Conference, John Thompson, and Cynthia Alvarado.

31. The allowance of Dr. Rodden’s report establishing how Dr. Barber has misused Dr. Rodden’s work is but another factor showing Dr. Barber’s lack of credibility. *See, e.g., Commonwealth v. Flor*, 259 A.3d 891, 917 (Pa. 2021) (noting that PCRA court found expert’s opinion lacking in credibility because the expert “essentially cherry-pick[ed] information to support a predetermined conclusion”); *Appeal of Avco Corp.*, 515 A.2d 335, 338 (Pa. Cmwlth. 1986) (explaining that, in assessing credibility, a “fact finder should consider the method by which the expert reached his or her conclusion,” and that “[a]ll the components that the expert considered are matters which the fact finder considers in determining the persuasive quality of the testimony”).

32. Dr. Rodden’s report is also likely to be helpful to the Court given the Court’s familiarity with his work and that the Court selected his map for the Commonwealth’s congressional districts. *See Carter v. Chapman*, ___ A.3d ___, 7 MM 2022 (Pa. Mar. 9, 2022).

C. Dr. Barreto's Supplemental Report.

33. Petitioner Benninghoff makes no real objection to the supplemental report of Dr. Barreto, because it does not include any new analysis or methodology. Instead, it simply corrects the record, in ways that expert reports do all the time, about how Petitioner Benninghoff has misrepresented his testimony and taken his analysis out of context.

D. Conclusion

34. For the above reasons, the Court either should deny Petitioner's application in total or, at most, deny the application as to Dr. Imai's and Dr. Barreto's supplemental reports, and treat Dr. Rodden's statement as an amicus curiae submission for the purpose of showing how Dr. Barber has misused his work.

Respectfully submitted,

March 14, 2022

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CERTIFICATE OF COMPLIANCE

I certify 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 from non-confidential information and documents.

/s/ Robert L. Byer _____