
In the Supreme Court of Pennsylvania
Middle District
No. 11 MM 2022

KERRY BENNINGHOFF, individually, and as Majority Leader of the
Pennsylvania House of Representatives,
Petitioner-Appellant,

v.

2021 LEGISLATIVE REAPPORTIONMENT COMMISSION,
Respondent-Appellee.

On Review of The Legislative Reapportionment Commission's Order
Adopting A Final Reapportionment Plan, PA. CONST. art. II, § 17(d)

**APPLICATION TO AMEND THE COURT'S FEBRUARY 17, 2022
ORDER TO ALLOW FOR REPLY BRIEFS AND ORAL ARGUMENT**

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** Application for pro hac vice
forthcoming*

Counsel for Petitioner-Appellant

Petitioner Benninghoff respectfully files this Application for an order amending this Court’s February 17, 2022 scheduling order for LRC Petitions for Review (the “Order”) to permit the filing of reply briefs and for oral argument. In this respect, Petitioner Benninghoff supports the similar Application filed by Petitioners Covert, Hulick and Covert on March 3, 2022 in Case No. 4 WM 2022. In further support of this Application, Petitioner Benninghoff states as follows:

1. Petitioner Benninghoff is the duly-elected Representative for the 171st House District, the Majority Leader of the Pennsylvania House of Representatives, and a Member of the 2021 Legislative Reapportionment Commission (“Commission”). He is also a registered voter in Centre County.

2. Petitioner Benninghoff filed his Petition for Review challenging the final legislative reapportionment plan adopted by the Commission on February 4, 2022 (“2021 Final Plan”) on February 17, 2022. Petitioner Benninghoff’s Petition for Review raised numerous constitutional issues with the 2021 Final Plan under both the United States and Pennsylvania Constitutions.

3. On February 17, 2022, this Court issued its Order stating that

“all Petitions for Review, as well as supporting briefs, challenging the final plan issued by the Legislative Reapportionment Commission on February 4, 2022, are to be received by this Court on or before March 7, 2022.” It further stated that “[a]ny consolidated answer, as well as a consolidated brief, filed by the Legislative Reapportionment Commission, as Respondent, shall be received by this Court on or before 2:00 p.m. on March 11, 2022.” Finally, the Order stated that no reply briefs would be permitted and no requests for extension would be entertained. It also indicated that absent further Order of this Court, Petitions for Review will be decided on submitted briefs.

4. This Court’s constitutionally mandated review of the lawfulness of the 2021 Final Plan is a matter of utmost importance to the Commonwealth. The Plan will set the boundaries of the Commonwealth’s House and Senate districts for the next decade. The Court would benefit from a full briefing process and oral argument for several reasons.

5. First, the ability to file a reply and to have oral argument is essential to ensuring the Court is fully briefed on the legal and factual issues in this case. The Court’s Order allows the Commission to file a consolidated answer and supporting brief to all petitions for review by

March 11. But absent reply briefs and/or oral argument, there will be no opportunity for Petitioner Benninghoff (or any other petitioner) to respond to the arguments and defenses raised by the Commission in its answer and brief. In every other case before this Honorable Court, an appellant has a right to file a reply brief, Pa. R.A.P. 2113(a), and doing so is essential for ensuring that this Court has the benefit of the Petitioners' responses to whatever legal and factual arguments the Commission musters in defense of the 2021 Final Plan. At this stage, Petitioner Benninghoff is largely left to guess what defenses and arguments the Commission might raise and therefore does not have a meaningful opportunity to preemptively rebut such arguments in his Appellant's Brief. Allowing reply briefs and/or oral argument ensures that this Court has a full adversarial process that tees up all factual and legal disagreements for the Court to resolve.

6. Second, although Petitioner Benninghoff understands the need to expedite these proceedings to resolve any appeals with sufficient time to avoid further chaos to the elections calendar, rushing the process without full briefing and oral argument tramples on basic principles of due process. This Court previously recognized in *Holt v. 2011 Legislative*

Reapportionment Commission, that adequate time is needed to conduct “meaningful appellate review.” 38 A.3d 711, 723 (Pa. 2012). For this Court to prohibit Petitioner (and other petitioners) from responding to arguments raised by the Commission, either through reply briefs or argument, would almost certainly impair the Court’s ability to provide that meaningful appellate review.

7. Curtailing Petitioner’s ability to respond to the Commission’s arguments due to a time-crunch is especially unfair because the delay in passing the 2021 Final Plan is largely the Commission’s fault. This Court in *Holt I* reminded the Legislative Reapportionment Commission “that the Constitution specifically authorizes appeals from final plans, and the LRC this year, and whatever entity bears the burden in future years, should thus approach its bipartisan constitutional task with an eye toward affording sufficient time for meaningful appellate review, if appeals are filed.” 67 A.3d at 723. In addition, the Court recognized that its decision holding the plan unconstitutional was a disruption to the 2012 primary election landscape and that it “trust[s] that the LRC will avert similar delay as it is called upon to faithfully execute its task upon remand, and . . . trust[s] that future such Commissions will act more

promptly.” *Id.* at 761. The Commission, however, did not adhere to that guidance and significantly delayed the process by deciding, through a bare majority vote of three Commissioners, to “reallocate” certain state prisoners to count them at a different location from where the U.S. Census Bureau has counted them for decades.

8. While the Commission received the Census data on August 12, 2021, and the data was available for use by the Commission as early as September 17, 2021, the decision to “reallocate” prisoners caused further significant delays in the process. The data necessary to reapportion the state based upon “reallocated” prisoners was not complete and certified by the Commission for use until October 25, 2021¹ – well over two months after the data was received by the Commission from the Census Bureau. In doing so, the Commission put further strain on the schedule necessary for a full and meaningful appellate process to play out. An extra month or two was critical time necessary for a more thorough briefing and review process on the constitutionality of the 2021 Final Plan. The Commission’s nonsensical decision to waste almost six

¹ The Commission met on October 25, 2021 to certify the data and backdated that certification to October 14, 2021.

weeks to reallocate certain state prisoners in a year already fraught with significant delays should not force this Court to detract from the time needed for a meaningful appellate review. Doing so unfairly allows the Commission to profit from a delay of its own creation, to the substantial detriment of petitioners and the citizens of this Commonwealth.

9. Third, and finally, the record of the proceedings before the Commission, which is over 10,000 pages, has still not been made publicly available via PACFile as of the date of this filing, and it is Petitioner Benninghoff's understanding that more than 2,000 pages of that record material was only produced on March 4. Yet, briefs supporting any petitions for review are due this Monday, March 7. Thus, there is virtually no time, if any time at all, for petitioners to review the record before supporting briefs are due. Allowing for reply briefs and/or oral argument will give all petitioners an opportunity to fully review the extensive record once it is made publicly available and to draw the Court's attention to important details in the record necessary to evaluate the constitutionality of the 2021 Final Plan.

10. Petitioners raise important constitutional challenges to the 2021 Final Plan. Their opportunity to adequately present these issues to

the Court should not suffer because of the Commission's failure to move expeditiously and decision to tinker with the census data. Rather, all petitioners should be given adequate opportunity to identify the constitutional infirmities with the 2021 Final Plan and to direct the Court to the evidence supporting such challenges. That can be best accomplished by allowing expedited reply briefs and/or oral argument.

WHEREFORE, Petitioner Benninghoff respectfully requests that this Court amend its prior order and set a deadline by which any petitioner may file a reply to the Commission's response brief or at a minimum set this matter for oral argument to address these important issues.

Dated: Philadelphia, Pennsylvania
March 4, 2022

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*Counsel for The Honorable Kerry A.
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CERTIFICATE OF COMPLIANCE

I hereby 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 than non-confidential information and documents.

/s/ Jeffry Duffy

Jeffry Duffy (PA No. 081670)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the within Application to Amend February 17, 2022 Order to Allow For Reply Briefs and Oral Argument was served this 4th day of March, 2022, by PACFile on all counsel of record.

/s/ Jeffry Duffy

Jeffry Duffy (PA No. 081670)