

Testimony of Patrick Beaty, Legislative Director  
and Carol Kuniholm, Chair, Fair Districts PA

Before the Pennsylvania Senate Committee on State Government  
Public Hearing on Congressional Redistricting  
May 26, 2021

Good morning, Chairman Argall, Chairman Street, and members of the State Government Committee.

Thank you for this opportunity to appear before you today to discuss the upcoming congressional redistricting in Pennsylvania and specifically the question of what criteria the General Assembly should apply in drawing the congressional district map.

My name is Patrick Beaty and I am the Legislative Director for Fair Districts PA. I am joined today by Carol Kuniholm, who is chair and a founder of our all-volunteer, grassroots organization dedicated to reform of Pennsylvania's redistricting processes for both congressional and state legislative redistricting. Carol and I also appeared before this committee in 2018 when you were considering whether to amend the state Constitution to create an independent citizens' redistricting commission. That bill (SB 22) passed the Senate in a historic vote of 35-14 in June of that year, but was not taken up by the House.

Unfortunately, time has now run out on the effort to create an independent commission for the current redistricting cycle. But there is still time to enact some meaningful guiderails in terms of mapping criteria and the redistricting process itself.

It is worth noting that even to ask the question about which mapping criteria are most desirable or appropriate for congressional redistricting draws attention to the fact that, unlike several other states, Pennsylvania currently has none in its Constitution or in statute. Of course, all states must comply with Federal requirements for districts of equal population and protections for racial minorities. But Pennsylvania has no constitutional or statutory standards to prevent unfair partisan gerrymandering of congressional districts of the kind we believe has occurred far too often in the Commonwealth.

Congressional Mapping Criteria Created by Judicial Action

The lack of constitutional or legislative enactments did not prevent the Pennsylvania Supreme Court from striking down the 2011 congressional map as an unconstitutional partisan gerrymander. In its 2018 [decision](#) in *League of Women Voters of PA v. Commonwealth of PA*, the Court for the first time required that the congressional map meet certain criteria which it determined were appropriate, requiring that districts 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.

The Court recited Pennsylvania’s long history of using similar “neutral” criteria in drawing district lines for the state House and Senate, and found that they were also appropriate for congressional redistricting. The above-quoted criteria are now the law of the land in Pennsylvania for congressional redistricting, even though they are not contained in the Pennsylvania Constitution or in any state statute.

It is, of course, theoretically possible that some future court decision could alter these criteria or apply them in a way that diminishes their importance. That possibility could be lessened – and the General Assembly could reassert its constitutional authority to enact legislation – by including these redistricting criteria in a statute.<sup>1</sup> [Senate Bill 222](#), which has been referred to this committee for consideration, includes language very similar to the above-quoted language in *LWVPA v. Commonwealth*.

The state Supreme Court described these traditional neutral criteria as a “‘floor’ of protection for an individual against the dilution of his or her vote in the creation of [congressional] districts.” (p. 123). In other words, keeping districts compact and contiguous and minimizing splits of political subdivisions can help in protecting each person’s constitutional right to a “free and equal” election. But the Court also recognized that these standards can be “subordinated ... to extraneous considerations such as gerrymandering for unfair partisan political advantage.”

That is really the crux of the Court’s decision in *LWVPA v. Commonwealth*. The Free and Equal Elections clause in Pennsylvania’s Constitution prohibits gerrymandering that unfairly dilutes the power of members of a political party to vote for congressional representatives who represent their views. (p. 128). The traditional neutral criteria requiring contiguity, compactness and respect for political subdivisions will be applied by the Court in evaluating future congressional redistricting plans. But compliance with those criteria does not mean a particular map will be upheld. The Court recognized that gerrymandering will still be possible as mapping technology continues to evolve.

Some have accused the state high court of engaging in its own gerrymander in favor of Democrats when it redrew the congressional map in time for the 2018 election. If that concerns you as legislators, you should also be worried about a new [lawsuit](#) filed in Commonwealth Court which could provide a vehicle for the Supreme Court to draw another congressional map if the General Assembly is unable to reach agreement with Governor Wolf in time for the 2022 election. You might want to consider whether there are any statutory changes you could make now to make gerrymandering more difficult to accomplish no matter who is drawing the lines.

### A Statutory Prohibition Against Partisan Gerrymandering

Now would seem to be the perfect time to state clearly in statutory law that partisan gerrymandering is prohibited for congressional redistricting. We now know for certain that the Commonwealth will be losing one congressional seat as a result of the 2020 census, making

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<sup>1</sup> 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).

redistricting perhaps more difficult than might otherwise be the case. But that reality does not seem to make it any more likely that the final legislation will produce an unfair advantage for either major political party. Voters will be watching much more closely this time. And there is also the current political reality in Pennsylvania – with the legislature controlled by one party and the governor’s office by the other.

A prohibition against partisan gerrymandering might not have a major impact on the 2021 congressional map. Its impact may not be fully realized until the next time when the legislative and executive branches are held by the same party in the year after a decennial census. No one can predict with confidence when those particular stars will be in alignment.

Even so, why wait? Why not give the voters what they deserve and have been demanding repeatedly from their elected representatives over many years? We agree that public policy should be established by the General Assembly whenever possible rather than by courts. The General Assembly should pass a law to prohibit unfair partisan gerrymandering once and for all in Pennsylvania.

According to Professor Justin Levitt’s [“Guide to Drawing the Electoral Lines,”](#) 17 other states have enacted laws or constitutional provisions intended to restrict undue partisanship. This includes states like Arizona, Colorado and Washington which seek districts that are competitive in a general election, as well as states like Florida which focus on the intent to favor or disfavor a political party. Fair Districts PA is supporting [Senate Bill 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.

The Brennan Center for Justice recommends similar language in its [model](#) redistricting reform bill, though the model bill does not include any consideration of partisan intent:

The redistricting plan shall not, when considered on a statewide basis, unduly favor or disfavor any political party.

Undue partisan result can be measured by various statistical [metrics](#). As the Brennan Center notes, not all partisan advantage would be prohibited as “undue” and a map with slight partisan imbalance would not be considered undue if done for a legitimate purpose like preserving communities of interest or respecting political subdivision boundaries. Similar clarifying language could be added to a bill banning partisan gerrymandering.

Such a prohibition would still allow negotiation between the parties and consideration of preserving existing district boundaries which tends to benefit incumbents.

## Equal Opportunity for Racial and Language Minorities

Last week, Pennsylvania voters overwhelmingly approved an amendment to the Pennsylvania Constitution that guarantees equal rights under law to members of racial and ethnic minorities. This new addition to our state constitution affords protection to minority groups completely separate from their rights under the U.S. Constitution and federal civil rights laws, and allows for the development of a body of law in state courts independent of any future federal court decisions interpreting federal law.

The new Article I, section 29, also provides a constitutional basis for the Pennsylvania General Assembly to enact implementing legislation specifically related to redistricting. SB 222 contains language requiring redistricting plans to provide racial and language minorities with equal opportunity to elect candidates of choice.

## Other Mapping Criteria

SB 222 includes several additional criteria which we believe are appropriate for both congressional and legislative redistricting. The bill separates these into categories of priority. The primary criteria include the ones previously discussed, as well as some additional limitations on dividing political subdivisions. Specifically, SB 222 prohibits dividing voting precincts and states that a county may not contain more congressional districts than the number required by the population plus one.

The limitation on county splits restrains the temptation mappers might otherwise feel to draw contorted districts stretching across multiple counties. Plus, as a mapping criterion, it has the advantage of being easily measured. The Census Bureau has just released data indicating that each congressional district will contain an average of 761,169 residents as a result of the 2020 census. Counties with populations larger than that number, but less than about 1.5 million residents (Allegheny and Montgomery), could be divided among no more than three congressional districts under SB 222. Philadelphia county, which currently includes portions of three congressional districts, could have no more than four in the next redistricting. Other counties could only contain a maximum of two congressional districts or portions of districts, subject to the limitation that no county or municipal splits are permitted unless absolutely necessary.

Secondary criteria would be applied when possible once the primary criteria have been met. These second-tier criteria include: keeping communities of interest intact, conforming district boundaries to natural boundaries like rivers and mountains, and assuring that the map will be responsive to changes in voter preferences.

Fair Districts PA believes there is broad support for these concepts among voters and members of the General Assembly. It should not be too difficult to convert popular concepts into legislation that can pass before the congressional redistricting process begins in earnest. We urge this committee to act soon to establish meaningful guiderails for congressional district mapping and other reforms to make the process of drawing district lines more transparent and open to public participation. We would be pleased to assist you in that effort.