Order

Michigan Supreme Court
Lansing, Michigan

March 25, 2022

Bridget M. McCormack,
Chief Justice

163952

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

In re APPORTIONMENT – KENT COUNTY – 2021

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LEAGUE OF WOMEN VOTERS OF MICHIGAN, KATHI HARRIS, KAREN JOSEPH, and COURTNEY WINELL,
Petitioners-Appellants,

SC: 163952
COA: 359310

v

KENT COUNTY APPORTIONMENT COMMISSION,
Respondent-Appellee.
_____/

On order of the Court, the application for leave to appeal the January 3, 2022 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J. (*concurring*).

I concur in the Court's denial order. I agree with my dissenting colleague's observation that this Court has not weighed in on what it means for a county commissioner district to "not be drawn to effect partisan political advantage" as required by MCL 46.404(h). I further agree that the various standards utilized in recent years by the Court of Appeals, see *Apportionment of Kent Co Bd of Comm'rs—1972*, 40 Mich App 508 (1972), and *In re Apportionment of Clinton Co—1991 (After Remand)*, 193 Mich App 231 (1992), are divorced from the text of the statute. Further, I appreciate the concerns raised about continuing uncertainty surrounding the meaning of MCL 46.404(h) and how it is to be applied in relation to the other criteria laid out in MCL 46.404.

Nonetheless, I support the majority's decision to deny leave to appeal in this case. Petitioners' arguments in this case ostensibly focus on MCL 46.404(b), MCL 46.404(e), and MCL 46.404(h). I detect no clear error in the Court of Appeals' rejection of assertions that the adopted plan is not contiguous in violation of MCL 46.404(b), or in its conclusion that the divisions of the townships, villages, and cities, MCL 46.404(e), are reasonable when considered in the context provided by the population and the need to satisfy the divergence standard. *Apportionment of Wayne Co Bd of Comm'rs—1982*, 413 Mich 224, 264 (1982) ("A reasonable choice in the reasoned exercise of judgment should ordinarily be sustained."). Even assuming that petitioners are correct that the adopted plan "shows a meaningful Republican bias" while the plans they support are

"significantly less biased,"[1] and that this is contrary to MCL 46.404(h), I do not think petitioners have raised a successful challenge to the adopted plan.

We do not view the criteria of MCL 46.404 in rigid order. *Wayne Co—1982*, 413 Mich at 259. That is, we do not require "exhaustive compliance with each criterion before turning to a succeeding criterion . . . ." *Id.* However, the statute clearly indicates that criteria (a) through (h) are "stated [in] order of importance[.]" MCL 46.404. According to the Legislature, that commissioner districts "not be drawn to effect partisan political advantage" is the criterion that holds the least weight. Petitioners fail to acknowledge that the adopted plan conforms to criteria that are, by statute, more essential. For example, they do not contest that the approved plan better achieves population equality, MCL 46.404(a),[2] and requires fewer combinations of townships and cities, MCL 46.404(d),[3] than either of their preferred plans. Because of the hierarchy set forth in MCL 46.404, regardless of what test or standard we might adopt to gauge partisan political advantage,[4] I see no way for petitioners' challenge to prevail.[5]

Again, I share my dissenting colleague's concerns about the lack of a statutory-language-based standard for MCL 46.404(h), but in this case the purported partisan edge is insufficient to overcome the simple fact that the adopted plan more closely adheres to the criteria that the Legislature has designated as more important. Therefore, I concur in the Court's denial order.

MCCORMACK, C.J., joins the statement of CAVANAGH, J.

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[1] It has been alleged that the adopted plan provides a 5.5% partisan edge to the Republican Party, while petitioners' preferred plan would give only a 1.6% advantage to the Republican Party.

[2] Pursuant to *Wayne County—1982*, 413 Mich at 263, the allowable population divergence is 11.9%. According to respondent, the petitioners' preferred plans had population divergences of 10.75% and 10.96%, while the adopted plan has a population divergence of only 6.43%.

[3] According to respondent, the approved plan include five instances where a township or part of a township is combined with a city. Petitioners' preferred plans allow for six instances of such combinations.

[4] Petitioners advocate for a results-based test without regard to intent, while respondents counter that the commission's intent to gerrymander is required to conclude that a plan has been drawn to effect partisan political advantage in violation of MCL 46.404(h).

[5] I must also note that petitioners' requested relief is for this Court to vacate the adopted plan and order the commission to adopt their preferred plan; however, the proper remedy would be a remand to the commission, not a judicial imposition of a plan that the commission flatly rejected. *Wayne County—1982*, 413 Mich at 266.

WELCH, J. (*dissenting*).

While much attention is paid to the decennial redistricting process for congressional and state legislative seats, far less attention is paid to the redistricting process for county commission seats in the same cycle. Michigan's county commissioners serve as the elected executive and legislative body for each county. Whether through direct employment, funding support, or collaboration with other entities, county governments affect many aspects of residents' daily lives, including law enforcement (sheriffs, prosecutors, and jails); courts; infrastructure (roads, water resources, and drainage); parks; administration of elections and vital records through the county clerk's office; local health departments; taxes; and general financing for a variety of county and cooperative programs, projects, and initiatives. Michigan's counties vary widely in the services offered to their constituents, often based on the priorities of those who are elected. While these services may be less known to the public than policy implemented in Lansing or Washington, D.C., they are certainly no less important given the tangible impacts for people in their backyards.

In 2018, Michigan voters overwhelmingly supported Proposal 2, which amended the state Constitution and created an independent citizens redistricting commission charged with following numerous criteria in drawing new congressional and legislative districts. One of the criteria requires that the independent commission ensure that the districts "shall not provide a disproportionate advantage to any political party." Const 1963, art 4, 6(13)(d). The measure passed with 61% of the statewide vote.

While that amendment did not affect the apportionment of county commission districts for general-law counties, Michigan has had a statute for more than 50 years stating that county apportionment (or redistricting) plans shall not "be drawn to effect partisan political advantage." MCL 46.404(h). For 50 years, that requirement has been effectively ignored by the courts. As a result, whatever political party has controlled a county apportionment body in a general-law county has been able to brazenly gerrymander county commission districts with little fear of reprimand from the courts.[6] Every 10 years, this Court is asked to consider the statute's anti-gerrymandering provision and its application. And every 10 years, this Court punts. The Court has, once again, missed a once-in-a-decade opportunity to provide much needed guidance about the meaning and enforceability of MCL 46.404(h).

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[6] In general-law counties, "the county apportionment commission shall consist of the county clerk, the county treasurer, the prosecuting attorney, and the statutory county chairperson of each of the 2 political parties receiving the greatest number of votes cast for the office of secretary of state in the last preceding general election." MCL 46.403(1).

While the legal standards for evaluating county apportionment challenges applied by the Court of Appeals in this case were adopted decades ago, they were not and still are not based on the language enacted by the Legislature. Moreover, under the Court of Appeals' current standards, it remains unclear what evidentiary threshold one must meet to even obtain a hearing on the merits or be entitled to further factual development under MCR 7.206(D)(4). This Court's continued silence not only ensures that challenges to a county apportionment plan premised on a violation of MCL 46.404(h) will remain effectively unavailable, but it also leaves county apportionment commissions without binding guidance as to how they should balance compliance with criterion (h) against the other criteria outlined in MCL 46.404(a) to (g).

All legal disputes concerning the reapportionment of county commissioner district lines are inherently difficult and time-sensitive, and the political undertones encourage courts to approach such disputes with caution. The United States Supreme Court recently held that "partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho v Common Cause*, 588 US ___, ___; 139 S Ct 2484, 2506-2507 (2019). See also *Vieth v Jubelirer*, 541 US 267, 274-276 (2004) (opinion of Scalia, J.). But *Rucho* was premised on the lack of a standard or rule found in the United States Constitution or federal law. *Rucho*, 588 US at ___; 139 S Ct at 2507. The Supreme Court's decision "does not condone excessive partisan gerrymandering. Nor does [its] conclusion condemn complaints about districting to echo into a void." *Id.* Instead, the Supreme Court left such matters to the states while specifically noting that some states, like Michigan, had approved constitutional amendments changing how and by whom state legislative and congressional districts would be drawn and others had statutes prohibiting or limiting "partisan favoritism in redistricting." *Id*. at ___; 139 S Ct at 2507-2508. Stated differently, states remain free to be the laboratories of democracy that they have always been. *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Michigan was already a pioneering laboratory of democracy in matters concerning the apportionment of districts for elected county officials long before *Rucho* was decided. In 1966, our Legislature prohibited drawing general-law county commissioner districts to "effect partisan political advantage" when it enacted MCL 46.404.[7] When a challenge to

[7] MCL 404.46 was enacted by1966 PA 261 and later amended by 1969 PA 137. The Legislature also enacted criteria to govern the apportionment of charter counties during the same legislative session. See 1966 PA 293 (codified at MCL 45.505), as amended by 1980 PA 7. That statute provides that districts "shall be drawn without regard to partisan political advantage." MCL 45.505(2). A third optional unified form of county governance was authorized by 1973 PA 139, MCL 45.551 *et seq*. Currently, only Wayne

a county apportionment plan is brought, the courts have an obligation to "review such plan to determine if the plan meets the requirements of the laws of this state." MCL 46.406. But since then, our Court has said little about the county apportionment process or the governing statutory standards. The Court previously rejected a deferential standard based on the "good faith" efforts of an apportionment commission because it was unworkable and recognized its obligation to provide "meaningful judicial review." *Apportionment of Wayne Co Bd of Comm'rs–1982*, 413 Mich 224, 265 (1982) (*Wayne Co—1982*). Instead, the Court held that "there will be areas for the exercise of judgment. A reasonable choice in the reasoned exercise of judgment should ordinarily be sustained." *Id.* at 264. But *Wayne Co—1982* is not dispositive of the current challenge brought under MCL 46.404(h).

Wayne Co—1982 focused on explaining how a county apportionment commission could lawfully balance compliance with MCL 46.404(a) to (f) with the population-proportionality ("one person-one vote") requirements imposed by the Equal Protection Clause of the United States Constitution. *Wayne Co—1982*, 413 Mich at 233-245, 249-264. While the Court rejected a "rigid reading of 'stated order' " in MCL 46.404, *id*. at 259, and noted that "[c]riterion (h) states that the pursuit of partisan political advantage may not be a goal," *id*. at 261, the Court's decision provided no guidance about how criterion (h) should be balanced against the other criteria in MCL 46.404. The only other decision from this Court interpreting MCL 46.404 likewise does not address MCL 46.404(h). See *In re Apportionment of Tuscola Co Bd of Comm'rs—2001*, 466 Mich 78 (2002). Thus, for over half a century, this Court has been silent about what MCL 46.404(h) means or how it should be balanced against the other statutory criteria. While lawsuits have been filed and appealed, the Court has consistently denied leave.

The Court of Appeals has attempted to fill in the gaps left in the vacuum created by this Court's silence. Several competing standards have emerged that are not based in the text of MCL 46.404(h).

One standard comes from *In re Apportionment of Kent Co Bd of Comm'rs*, 40 Mich App 508, 513-514 (1972) (*Kent Co—1972*). In *Kent Co—1972*, the Court of Appeals held that the proffered analysis of prior election results "has little bearing on the good faith of the apportionment commission in drawing the commissioner districts," *Kent*

County and Macomb County are charter counties, and only Oakland County and Bay County have adopted the unified form. See Citizens Research Council of Michigan, *Counties in Michigan: An Exercise in Regional Government* (March 2017), p 5 <https://crcmich.org/PUBLICAT/2010s/2017/rpt395_counties_exercise_regional_government-2017.pdf> (accessed February 24, 2022) [https://perma.cc/ULT5-T2G6]. All other counties in Michigan are general-law counties in which the county commission serves as the top legislative and executive body of the county.

Co—1972, 40 Mich App at 511, that there was no statutory or constitutional requirement that "the plan must reflect the proportionate vote of either political party in the county," *id*. at 512, and that the petitioners failed to "demonstrate that the action of the Kent County Apportionment Commission constituted 'an intentional and systematic political gerrymander disenfranchising large numbers of registered voters . . . who regularly vote Democratic,' " *id*. at 513. In reaching its holding, the panel did not rely on the actual statutory language of MCL 46.404(h). Instead, the panel drew from *Whitcomb v Chavis*, 403 US 124, 153-155 (1971), a case concerning allegations of unlawful race-based redistricting brought under the Equal Protection Clause of the United States Constitution. See *Kent Co—1972*, 40 Mich App at 513-514. With zero analysis of the language of MCL 46.404(h), the court held as follows:

> We will not find any county's apportionment plan, which otherwise demonstrates a *good faith effort* to achieve districts of equal population, to have been drawn to effect partisan political advantage without the presentation of actual evidence by the petitioners that this consideration in adoption *was prominent in the deliberations by the drafters to the neglect of the other statutory guidelines*. [*Kent Co—1972*, 40 Mich App at 514 (emphasis added).]

The next missed opportunity was presented in *In re Apportionment of Clinton Co—1991 (After Remand)*, 193 Mich App 231 (1992) (*Clinton Co—1991*). In that case, the petitioners had conceded at oral argument that their partisan-political-advantage argument lacked merit because of the demographic factors. *Id*. at 235 ("[A]t oral argument it was conceded that there is effectively no Democratic political strength throughout the county . . . ."). Despite this, and without engaging with the text of MCL 46.404(h), the Court of Appeals held:

> We therefore need not decide whether a motivation test, *City of Mobile v Bolden*, 446 US 55; 100 S Ct 1490; 64 L Ed 2d 47 (1980), or a stricter results test, *Chisom v Roemer*, 501 US 380 [380]; 111 S Ct 2354; 115 L Ed 2d 348 (1991), is appropriate when a petition is filed challenging the legality of a reapportionment plan in light of MCL 46.404(h); MSA 5.359(4)(h). We note, however, that if partisanship can be demographically and cartographically established, it is usually considered intentional for the reasons adduced in *Gaffney v Cummings*, 412 US 735, 749-751; 93 S Ct 2321; 37 L Ed 2d 298 (1973).
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> Because there is no claim that precincts have been divided, and we have already rejected a claim that districts were drawn to effect partisan political advantage—particularly in the absence of any indication that the

> adopted plan unfairly alters the existing allocation of political power vis-a-vis voting strength, thus putting judicial interest "at its lowest ebb," *Gaffney*[, 412 US at] 753-754; *Davis v Bandemer*, 478 US 109, 128-129; 106 S Ct 2797; 92 L Ed 2d 85 (1986)—we conclude that the adopted plan "meets the requirements of the laws of this state." [*Clinton Co—1991*, 193 Mich App at 235, 239.]

This Court denied leave to appeal in both *Kent Co—1972* and *Clinton Co—1991*, and no other published decisions from the Court of Appeals have touched on the meaning of MCL 46.404(h). It thus appears that under existing Court of Appeals precedent, to prevail on a challenge under MCL 46.404(h), a petitioner must show one of the following: (a) a lack of good faith by the apportionment commission, (b) evidence that partisan advantage was a prominent consideration of the apportionment commission, or (c) evidence that the adopted plan unfairly alters existing allocations of political power vis-à-vis voting strength. All of these standards are divorced from the text of MCL 46.404(h), and they have become nearly impossible to meet from an evidentiary perspective.[8] Deference to a commission's good-faith efforts was rejected in *Wayne Co—1982*. Moreover, in a reality where county reapportionment plans are not required to be drawn during open meetings[9] and apportionment commission members refuse to debate allegations of unfair political partisanship when they are raised,[10] it is unlikely that

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[8] For example, most, if not all, reapportionment challenges in 2011 were also disposed of without a full hearing on the merits, and often without factual development, using peremptory orders like the one that petitioners appeal in this case. See, e.g., *In re Apportionment—Kent Co—2011*, unpublished order of the Court of Appeals, entered Aug 9, 2011 (Docket No. 304697) (holding that the petitioners had not met their evidentiary burden for an MCL 46.404(h) challenge under *Clinton Co—1991*); *In re Apportionment—Presque Isle Co—2011*, unpublished order of the Court of Appeals, entered August 9, 2011 (Docket No. 304772) (holding that the petitioners had not met their evidentiary burden for an MCL 46.404(h) challenge under *Clinton Co—1991*); *In re Apportionment—Marquette Co—2011*, unpublished order of the Court of Appeals, entered July 12, 2011 (Docket No. 304414) (holding that the petitioners had not met their evidentiary burden for an MCL 46.404(h) challenge under *Clinton Co—1991*).

[9] The typical process appears to be for members of the county reapportionment commission to present previously prepared apportionment plans to the commission for consideration. In this case, plans were submitted by the county chairs of the Republican Party and Democratic Party.

[10] In this case, for example, one member of the Kent County Apportionment Commission raised concerns about the partisan advantage created by the proposed plan that was later adopted, but the other commission members declined to engage in any discussion of those concerns.

there will ever by evidence in the official minutes that supports a violation of MCL 46.404(h). One might conclude that the sole viable path to a meritorious MCL 46.404(h) challenge under current precedent is to show that an adopted plan unfairly alters existing allocations of political power vis-à-vis voting strength. This might be a viable option, if one can present strong evidence that one or more of the existing districts in which a majority of residents tend to vote one way has been broken up or reconfigured in a manner that shifts the balance in the other direction. But this method only helps with dilution-based claims. It does not allow for consideration of changing demographics or more advanced statistical analysis. If the Legislature had intended for only one narrow form of political gerrymandering to be prohibited, it would not have needed to enact a broad prohibition stating that "[d]istricts shall not be drawn to effect partisan political advantage." MCL 46.404(h).

Our obligation to provide "meaningful judicial review," *Wayne Co—1982*, 413 Mich at 265, sometimes requires the Court to answer difficult questions to which there are no clear answers. I believe the Court has missed yet another opportunity to answer the difficult question of what the anti-gerrymandering language in MCL 46.404(h) means and how it can be applied in practice, and I am concerned that the Court of Appeals' current standards are not grounded in the statute. Perhaps the asserted partisan favoritism in this case would have been disproven or discredited. Or perhaps the assertion would not matter after criterion (h) is weighed against criteria (a) to (g). There is no way to know because existing precedent provides no guidance as to how such a balancing act should be performed.

I am also concerned that the Court of Appeals did not decide this case correctly under its own existing precedent. The majority in the Court of Appeals declined to refer this case to the circuit court under MCR 7.206(D)(4) for review of the evidence presented by the petitioners through an extensive report authored by a nationally recognized voting-rights and elections expert who has testified before many courts in this country.[11] The

[11] While the petitioners' proffered report has yet to be formally admitted into evidence due to the lack of an evidentiary hearing, the report was authored by Christopher Warshaw, J.D., Ph.D. He is a political scientist at George Washington University who studies public opinion, representation, elections, and polarization in American politics. He has provided expert reports in at least four redistricting cases, and he has provided expert testimony in three federal lawsuits related to the United States Census. If this case had been referred to the circuit court for factual development, then respondent could have challenged Dr. Warshaw's credentials or the methods used in his report under MRE 702 and 703.

report purports to provide statistically conclusive proof that the adopted plan for Kent County favors the Republican Party substantially more than the alternative plan that was rejected by the apportionment commission. The petitioners argue that this demonstrates the respondent's intent to create a partisan political advantage under the plain language of MCL 46.404(h), as well as under *Clinton Co—1991*. Absent from the respondent's answer in the Court of Appeals (or in this Court) was any data, expert report, or statistical analysis refuting the opinions of the petitioners' expert. While it is highly likely that the respondent would have provided some counterevidence had the case been referred to the circuit court for factual development, it is shocking that the Court of Appeals deemed this unnecessary. If unrebutted statistical analysis from a seemingly qualified expert claiming to demonstrate that an adopted map creates an unfair and unnecessary partisan advantage in violation of MCL 46.404(h) is not enough to get an evidentiary hearing, then what is?

I believe the petitioners presented prima facie evidence of a potentially meritorious challenge to the adopted county apportionment plan under MCL 46.404(h). Accordingly, I believe the Court of Appeals majority abused its discretion by dismissing the petitioners' challenge without a full hearing on the merits or any further factual development. MCR 7.206(D)(4). At a minimum, this case should have been referred to the circuit court for appointment of a special master to make factual findings concerning the petitioners' evidence and any counterevidence the respondent may have produced. Instead, the residents of Kent County have been denied meaningful judicial review of a potentially meritorious claim of unlawful partisan gerrymandering.

The sum of the issues outlined above leaves me deeply disappointed in the Court's decision to deny leave to appeal. We instead will wait 10 more years. Perhaps then the uncertainty surrounding MCL 46.404(h) will finally be resolved. I respectfully dissent.

BERNSTEIN, J., joins the statement of WELCH, J.