

Case No. 3:21-cv-211-RAH-ECM-KCN

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
EASTERN DIVISION**

THE STATE OF ALABAMA, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,

Defendants.

**AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS FROM
(1) SENATE OF PENNSYLVANIA REPUBLICAN CAUCUS,
(2) PENNSYLVANIA SENATE PRESIDENT PRO TEMPORE JAKE
CORMAN, AND
(3) PENNSYLVANIA SENATE MAJORITY LEADER KIM WARD**

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Amici Curiae, the Senate of Pennsylvania Republican Caucus (the “Caucus”), Senate Majority Leader Kim Ward, and Senate President Pro Tempore Jake Corman file this brief in support of Plaintiffs, the State of Alabama, Robert Aderholt, in his official and individual capacities; William Green; and Camaran Williams.

STATEMENT OF INTEREST OF AMICI CURIAE

The three amici curiae submitting this brief are interested in this action by virtue of duties imposed by their official positions in the government of the State of Pennsylvania, and the duties imposed by the State’s Constitution. In brief, their official positions call on them to rely on data provided by the U.S. Department of Commerce through its Bureau of the Census for performing their duties. As shown in more detail below, census data is used for figuring proper intrastate reapportionment of legislative districts as well as proper distribution of certain public funds.

All three amici are, in the words of the Census Act, “officers or public bodies having responsibility for legislative reapportionment or districting of [the] State.” 13 U.S.C. § 141. The Caucus is composed of all Republican members of the Senate of the State of Pennsylvania. Under Article II, § 16 of the Pennsylvania Constitution, the Senate is composed of 50 members. The Senate is one part of the General Assembly of Pennsylvania in which “the legislative power of this

Commonwealth” is vested, under Article II, § 1 of the State Constitution. The Caucus was created with the Senate’s constitutional authority under Article II of the State Constitution. At present, the Caucus is composed of 27 Senate members, and one Independent who caucuses with Republicans. The Caucus is said to be “an integral constituent of the Senate” and to perform “essential legislative functions and administrative business in the Senate.” *Precision Mktg., Inc. v. Com., Republican Caucus of the Sen. of PA*, 78 A.3d 667, 675 (Pa. Cmwlth. 2013).

The President Pro Tempore Jake Corman (“PPT”) is an officer of the State Senate, as established by Art. II, § 9 of the State Constitution. Subject to election by the full Senate, the PPT serves as the President of the Senate in the absence of the Lieutenant Governor. Pa. Const., Art. IV, § 4. The PPT is also responsible, along with the Speaker of the House, for certifying the four (4) legislative members of the Legislative Reapportionment Commission under Pennsylvania’s Constitution. Pa. Const. Art. II, § 17(b).

The Majority Leader Kim Ward is elected by vote of the Caucus. According to the Rules of the Senate, the Majority Leader serves as President of the Senate in the absence of the Lieutenant Governor and of the PPT. *See* Rules of the Senate of Pennsylvania, Rule 5 (adopted Jan. 5, 2021). In addition to her role with the Senate, the Majority Leader is a member of the Commonwealth’s Legislative Reapportionment Commission. Pa. Const. Art. II, § 17(b).

The State Senate’s lawmaking power, and therefore part of the official duties of members of the Caucus, includes the establishment of district lines for the members of Congress elected from Pennsylvania. *See* 2 U.S.C. § 2c (“there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled”). In addition, the boundaries of the districts, from which Senators are elected, are adjusted by a Legislative Reapportionment Commission “in each year following the year of the Federal decennial census.” Pa. Const., Art. II, § 17(a), (c).

The Plaintiffs’ complaint and memorandum of law submitted in support of their motion, as well as other amici, have detailed a great number of harms that will result from the Census Bureau’s use of differential privacy. Without this Court’s intervention, identical and similar harms will occur across the nation, including in the Commonwealth of Pennsylvania.

Amici share the concerns the Plaintiffs have detailed in their Complaint, and thus wishes to inform the Court of certain other injuries that the use of differential privacy will inflict. In short, the inaccurate and delayed census data will significantly harm communities’ planning capabilities, funding streams, and political environments, and needlessly generate a substantial amount of litigation centered on state legislative redistricting.

The litigation experience of Pennsylvania during the last several decades over census-dependent redistricting shows the depth of the interest about the issues raised here. The effect extends to establishing districts for both Congressional seats¹, as well as the districts from which the members of its Senate (as well as the members of its House) are elected.² That experience shows a continuing interest in

¹ See *In re Pennsylvania Congressional Dist. Reapportionment Cases*, 535 F. Supp. 191 and 567 F. Supp. 1507 (M.D. Pa. 1982) (refusing to preliminarily and later permanently enjoin the congressional redistricting plan following the 1980 decennial census); *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992) (choosing from among six plans submitted by various elected officials because the General Assembly had not timely passed legislation approving a map); *Donatelli v. Casey*, 826 F. Supp. 131 (E.D. Pa. 1993)(holding that the temporary representation of a district by an individual no longer residing in the district as a result of redistricting did not violate the state or federal Constitutions, pending the expiration of the official’s term of office); *Erfer v. Commonwealth*, 794 A.2d 325 (Pa. 2002) (upholding Act 1, the General Assembly’s legislation redrawing congressional districts following the 2000 Census); *Vieth v. Pa.*, 188 F. Supp. 2d 532 and 195 F. Supp. 2d 672 (M.D. Pa. 2002) (declaring 2000 congressional redistricting plan unconstitutional and ordering the General Assembly to prepare a revised plan); *Vieth v. Pa.*, 241 F. Supp. 2d 478 (M.D. Pa. 2003) (upholding the GA’s supplemental redistricting plan passed following the Court’s Order in *Vieth I*); *League of Women Voters of Pa. v. Commonwealth*, 175 A.3d 282 (Pa. Jan. 22, 2018) (striking down the Congressional Redistricting Act of 2011 and ordering delivery of a new plan by the General Assembly no later than Feb. 9, 2018—approximately 18 days from the date of the Court’s order); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. Feb. 7, 2018) (opinion in support of Jan 22 Order); *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083 (Pa. Feb. 19, 2018) (adopting a reapportionment plan for federal Congressional districts generated by the Court in light of the General Assembly’s “failure” to “timely” submit a revised plan following the Court’s January 22, 2018 Order); *Agre v. Wolf*, 284 F. Supp. 3d 591 (E.D. Pa. 2018) (court rejected claims of partisan gerrymandering on grounds it’s a non-justiciable political question); *Corman v. Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018) (federal court rejected request by legislators and elected officials to enjoin the use of the Court’s redistricting plan following League of Women Voters).

² See *Commonwealth ex rel. Spencer v. Levin*, 293 A.2d 15 (Pa. 1972) (encompassing seventeen (17) cases challenging the plan, but upholding the Commission’s final plan); *In re Reapportionment Plan for the Pennsylvania General Assembly*, 442 A.2d 661 (Pa. 1982) (encompassing twenty-nine (29) cases challenging the plan, but upholding the Commission’s final plan); *In re 1991 Pennsylvania Legislative Reapportionment Com.*, 609 A.2d 132 (Pa. 1992) (encompassing twenty-five (25) cases challenging the plan, but upholding the

the timely and accurate receipt of census data—as Alabama and the other Plaintiffs seek here.

For these reasons, the Caucus has the kind of interest that the Court grant the Plaintiffs’ motion to preliminarily enjoin the Defendants’ from both implementing differential privacy and delaying the provision of accurate census data. Anything less will result in deliberately late and false population tabulations, which would not only be useless, but would actually inflict great damage to our State’s political and financial wellbeing.

ARGUMENT

These amici urge the Court to grant the declaratory and injunctive relief, or alternatively, mandamus relief, as sought by the Plaintiffs. The Defendants have “specific tabulations of population” due to be “reported to the Governor . . . and to the officers or public bodies having responsibility for legislative apportionment or

Commission’s final plan); *Harrison v. Pennsylvania Legislative Reapportionment Com.*, 1992 U.S. Dist. LEXIS 5315 (E.D. Pa. April 21, 1992) (court rejected challenge to final redistricting plan); *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989 (Pa. 2002) (encompassing eleven (11) cases challenging the plan, but upholding the Commission’s final plan); *Pileggi v. Aichele*, 843 F. Supp. 2d 584 (E.D. Pa. 2012) (use of the 2001 plan adopted by the LRC was appropriate pending final resolution of the post-2010 decennial census reapportionment plan); *Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711 (Pa. Jan. 2012) and 38 A.3d 711 (Pa. Feb 2012) (Holt I) (encompassing twelve (12) cases challenging the plan, and remanding the plan to the Legislative Reapportionment Commission on a finding that the final plan was contrary to law); *Holt v. 2011 Legislative Reapportionment Comm’n*, 67 A.3d 1211 (Pa. 2013) (Holt II) (upholding the plan created by the Commission following the 2012 remand in Holt I) *Garcia v. 2011 Legislative Reapportionment Comm’n*, 938 F. Supp. 2d 542 (E.D. Pa. 2013) (rejecting challenges to the 2011 final plan and application to the 2013 and 2014 election cycles) and *Garcia v. 2011 Legislative Reapportionment Comm’n*, 559 Fed. Appx. 128 (3d Cir. 2014) (rejecting challenge to redistricting plan on standing grounds).

districting.” 13 U.S.C. § 141(c). Moreover, the deadline for these “tabulations of population” is “within one year after the decennial census date.” (*Id.*). That date passed on March 31. Nonetheless, Defendants in the name of enhancing privacy of census respondents are alleged to have abandoned the administrative techniques used in 2000 and 2010. Instead, they are arranging with a technique known as “differential privacy” to provide false data for the intrastate “tabulations” required by § 141(c). *See* Complaint at 19–31 (Mar. 10, 2021) (Doc. 1). For the reasons set out below, these amici object to this change of course, and request the Court not allow it.

I. The traditional tabulation of census data, unlawfully delayed and altered in the name of differential privacy, is needed for fair apportionment of representation, as well as reliable planning of local funding streams.

In 2019, the Pennsylvania State Data Center (“PaSDC”) submitted a report (attached as “Exhibit A”) to the United States Census Bureau outlining many of the harmful effects the Census Bureau’s use of differential privacy would cause within the Commonwealth of Pennsylvania. The PaSDC (established in 1981 by executive order of the governor of Pennsylvania) serves as the state’s official source of population and economic statistics, and as the state’s liaison to the Census Bureau. The PaSDC serves businesses, non-profits, government agencies, and individuals, answering more than 15,000 requests for information each year. It also assists the

Pennsylvania Legislative Reapportionment Commission and the General Assembly with census data analysis for districting purposes.

The PaSDC's 2019 report followed a 2019 Census Bureau preview of how the differential privacy algorithm would distort 2020 census data by applying the algorithm to 2010 census data. That application resulted in what are known as the "Demonstration Files," consisting of the demonstration version of Public Law 94-171 (which requires the Census Bureau to provide states opportunity to identify the small area geography for which they need data for legislative redistricting) and selected tables from the proposed 2020 Demographic and Housing Characteristics Summary File ("Summary File") for all states, Puerto Rico, and the District of Columbia. The PaSDC then compared the Summary File data for Pennsylvania's counties and county subdivisions (i.e., municipalities), and compared the Public Law 94-171 redistricting data for Pennsylvania's state legislative districts. Below, the Caucus outlines the PaSDC's findings, which are as alarming as they informative, and demonstrates how inaccurate census data derails Pennsylvania's ability to accurately and fairly operate its state loans, grants, and funding programs.

A. The Census Bureau's Demonstration Files reveal differential privacy's use generates inaccurate and unreliable population statistics.

The PaSDC's comparison of the Demonstration Files with original 2010 census data revealed that differential privacy causes considerable deviations in

population tabulations at the county subdivision level.³ In fact, the differential privacy algorithm caused the populations of at least 84 county subdivisions to reflect an increase of more than twenty percent from the original 2010 census data. The algorithm doubled (or more than doubled) the population of 12 of the communities. Conversely, at least 37 county subdivisions lost over 20% of their populations. *See* (Ex. A at 2).

Differential privacy inflated persons-per-household statistics, distorted age cohorts (five-year ranges in age, such as 35–39 or 40–44) to show zero members of more than half of the age cohorts in 175 county subdivisions and zero members in 25% of the age cohorts in another 730 communities. *See (Id. at 2–3)*. The PaSDC also noted many county subdivisions experienced significant differences in their racial makeup—those where the single race alone represented two percent or more of the total population higher as a result of differential privacy than in the original 2010 census data. *See (Id.)*.

Additionally, the PaSDC found that differential privacy changed the total population numbers in most of Pennsylvania’s state Senate and House districts. For State House Districts, 98 lost population and 105 gained population, with decreases as high as 655 persons lost and increases as high as 771 persons gained. For State

³ A graph depicting the differences for all municipalities is available at <https://public.tableau.com/views/DifferentialPrivacyandMunicipalPopulations/DFandPAMunicipalities>

Senate Districts, 28 lost population while 22 gained. The largest population decrease was 815 persons while the largest increase was 1,321 persons. *See (Id. at 3)*. As noted in explaining the interest of these amici, if past is prologue, Pennsylvania's redistricting process is sure to be highly scrutinized in the courts again, as evident by the recent court ruling, *League of Women Voters v. Commonwealth of Pennsylvania*, 178 A. 3d 737 and 181 A.3d 1083(Pa. 2018), implementing remedial congressional districts. The distorted numbers, if allowed, will only inject erroneous data and confusion into that scrutiny, and significantly increase tensions and the likelihood of litigation.

B. Erroneous census data would impair or eliminate the equitable distribution of funds received under Pennsylvania's grant, loan, and funding programs and create distrust of state and local government.

Many—if not all—of Pennsylvania's communities depend on an accurate reporting of Decennial Census data because such data is criteria for eligibility for several of Pennsylvania's grant, loan, and funding programs. Therefore, distorted and inaccurate population tabulations would significantly affect whether and how much funding certain communities could receive. The PaSDC provided many compelling examples of how distorted census data would directly harm many of Pennsylvania's county subdivisions, especially those with limited or declining resources.

The Municipal Liquid Fuels Program

The Municipal Liquid Fuels Program (“MLF”) makes funding available to local governments (i.e., county subdivisions) to support construction, reconstruction, maintenance, and repair of public roads or streets. Because Pennsylvania relies on accurate census data to determine how Liquid Fuel funds are to be distributed to the state’s more than 2,500 communities, the program’s method of distributing funds is one of the most visible examples of how differential privacy would directly (and arbitrarily) affect our State’s local governments and communities. *See* 72 P.S. § 2615.7(b) (Requiring population calculations for apportionment to be based on most recent census figures).

MLF funds are no small issue. Local governments across Pennsylvania profoundly depend on them for a variety of activities in their local area, not the least of which is maintaining their roads in the harsh Pennsylvania climate, where freeze/thaw cycles are destructive. Applying the differential privacy algorithm to the 2010 census data reduces the total population of 1,200 local governments, resulting in a redistribution of \$2.4 million of MLF funds (based on false numbers rather than actual population). To the state’s smaller communities, especially those that are economically depressed, even small losses of such funds would certainly be harmful. That demonstrable redistribution directly thwarts Pennsylvania’s

ability to accurately and fairly operate its programs and distribute state tax dollars in a logical and equitable fashion.

Other state grant, loan, and funding programs

Inaccurate 2020 census population data would also frustrate Pennsylvania's ability to operate many other grant and loan programs. For example, the City Revitalization Improvement Zone ("CRIZ") provides opportunities to spur new growth, helps revive downtowns, and creates jobs for local residents. The program develops "pilot zones" based on areas of a certain geographic size and a population of at least 7,000. *See* 72 P.S. § 8802-C. Of course, the false data resulting from the use of differential privacy jeopardizes (and makes it impossible to predict) the eligibility of CRIZ benefits for municipalities in that population range.

There is no question that differential privacy's inaccurate population totals would severely impact county subdivisions' eligibility for and receipt of various programs, loans, and grants. The only question is which subdivisions will suffer as a result of the incorrect data, and to what degree.⁴

⁴ *See, e.g.*, 72 P.S. § 1602-D (Codifying the Local Government Capital Project Loan Program, which denies eligibility for its low-interest loans to local governments whose population exceed \$12,000); 64 Pa.C.S. § 1557(e)(2) (PA Venture Capital Investment Program, requiring at least 50% of program's funding be spent in areas with populations of 1,000,000 or less); 73 P.S. § 400.2508 (Community Development Bank Loan Program - eligibility based on whether county population declined by at least 10 percent outside of metropolitan areas); 35 P.S. § 751.10 (Infrastructure Investment Authority - limiting funding for improvements to lesser of \$1,000 per resident or \$10,000,000); 72 P.S. § 8822-G (Rural Jobs and Investment Tax Credit Program - eligibility based on population thresholds of 50,000).

Similarly, some programs within Pennsylvania consider population decline to prioritize eligibility—which, of course, cannot be accurately determined based on inaccurate population numbers.⁵ For example, PaSDC found that “one hundred communities in Pennsylvania that would have reported a population increase in 2010 under the original [2010 census data] would report a decrease in 2010 under the Demonstration Files (using differential privacy).” (Ex. A at 6). “[O]ver two hundred communities that would have reported a population decrease in 2010 under the original [2010 census data] would report an increase in 2010” using differential privacy. (*Id.*). Therefore, differential privacy would thwart the state’s desire to prioritize those communities most in need because the algorithm would cause their populations to be falsely inflated to the point of appearing to have experienced a population increase.

To conclude, the use of differential privacy needlessly distorts crucial population data at the county subdivision level. Consequently, because Pennsylvania statutes require state grant, loan, and funding programs to distribute tax dollars according to accurate census data, the use of differential privacy precludes the government’s ability to comply. The use of differential privacy will

⁵*See, e.g.*, 12 Pa.C.S. § 3401 (Infrastructure and Facilities Improvement Program, providing grants to issuers of debt to assist with payment of debt service—guidelines available at: <https://dced.pa.gov/programs/infrastructure-and-facilities-improvement-program-ifip/>); 64 Pa.C.S §1551 (Business in Our Sites Grants and Loans, helping communities attract growing businesses—guidelines available at <https://dced.pa.gov/programs/business-in-our-sites-grants-and-loans-bos/>).

exchange Pennsylvania's logical and purposeful distribution of grants, loans, and other funds to its taxpayers for a new distribution based on arbitrary and distorted census data. Not only will such a method thwart the policies and strategies behind such distribution, it will also sow distrust in the minds of the state's taxpayers regarding how their tax dollars are being apportioned.

II. The deadline for delivery of intrastate census population data set out in § 141(c) means what it says, and is due to be enforced as written.

The delay in the release of population data until September in derogation of the March 31 deadline imposed by 13 U.S.C. § 141(c) will squeeze unduly the Pennsylvania General Assembly in its work. There will be only five short months—until mid-February 2022 when candidates begin circulating petitions for ballot listing—to create a Congressional district plan, enact a statute adopting the plan, and potentially litigate it. At least, that tightened schedule will operate unless there is a legislative change in the 2022 primary election. Likewise the Legislative Apportionment Commission will face similar problems in establishing a plan for the Senate and House districts of the General Assembly. Again, in light of the extensive litigation history within Pennsylvania, a compact time frame invites an increase in litigation that places significant pressure on the legislature, Redistricting Commission, Courts, and candidates. For these reasons, these amici urge the Court to conclude that § 141(c) means what it says, and should not be allowed, in effect, to be re-written by administrative officials.

CONCLUSION

For these reasons, these amici request the Court grant relief to the Plaintiffs, as requested in their Complaint.

Respectfully submitted on April 12, 2021.

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CERTIFICATE OF SERVICE

I certify that on April 12, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to:

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