

See Attachment

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

**RICHARD VIETH, NORMA JEAN
VIETH, and SUSAN FUREY,**

Plaintiffs

v.

**COMMONWEALTH OF
PENNSYLVANIA, et al.,**

Defendants

CIVIL NO. 1:CV-01-2439

NYGAARD, Circuit Judge

YOHN, District Judge

RAMBO, District Judge

YOHN, DISTRICT JUDGE, DISSENTING:

I agree with majority that the plaintiffs have met the first prong of the *Karcher* test and that the appropriate remedy, if Act 1 is unconstitutional, is to give the Commonwealth of Pennsylvania a reasonable period of time to enact a constitutionally sound redistricting plan.

I respectfully dissent, however, from Section II.B. of the majority opinion and conclude that defendants have met their burden, although just barely, to establish a justification for the nineteen person maximum deviation, and that Act 1 therefore passes constitutional muster.

In *Karcher v. Daggett*, 462 U.S. 725 (1983), the Court stated that the plaintiffs' "success in proving that the Feldman Plan was not the product of a good faith effort to achieve population equality means only that the burden shifted to the state to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." (emphasis added). 462 U.S. at 740. Thus, the focus

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of the second prong of the *Karcher* test is the state's justification for the population deviations in Act 1.¹

The defendants have pointed to a litany of state interests behind Act 1; however, since the focus of our inquiry in the justification phase of the *Karcher* analysis is the population deviation, the only justification submitted which deals with that issue is the policy objective of limiting voter precinct splits. Defendants contend that Act 1 could be "zeroed-out" by using Modification One but that this would entail splitting twenty-six voting precincts rather than the split of six voting precincts in Act 1.

Both parties agree that splitting precincts creates additional costs and work for county election officials in acquiring voting machines, in customizing ballots, in training precinct officials, in registering voters and in counting ballots. In addition, it increases the potential for voter confusion and candidate confusion. Thus, the desire to minimize the splitting of voting precincts is a legitimate justification, particularly when the overall population deviation is only nineteen.

The evidence with reference to this justification is, however, minimal. Dr. John Memmi testified that he was the cartographer who worked on the final draft of what became Act 1. When he reached the population deviation of nineteen he was told by his superiors that he could stop work. Inexplicably, neither party asked Dr. Memmi who told him this or called as a witness the person who told him to stop work

¹ The majority correctly points out that the Court has "made clear that the burden borne by the state varies inversely with the magnitude of the population deviation. . . . That is, the greater the deviation, the more compelling the government's justification must be." It would seem therefore that a nineteen person deviation in a congressional district of 646,371 or 646,372 would require a justification on the lowest end of the "justification" scale.

in order to explore the basis for the decision. As a result, we are left to draw inferences from the evidence presented.

Defendants ask us to draw the inference that the effort to equalize population was halted because of a desire not to split any more voting precincts. There are 9,427 voting precincts in Pennsylvania but there are 322,424 census blocks. Act 1 as enacted contained six voting precinct splits. (Defendants' exhibit 92). Subsequent to the enactment of Act 1 Dr. Memmi made further adjustments of census blocks in order to produce a plan with a zero population deviation. Using census blocks inevitably leads to more voter precinct splits and the resulting plan, designated as Modification One contains twenty-six voting precinct splits. (Defendants' exhibit 90).

This inference is also supported by the testimony of Dr. Memmi concerning the conversation when he was working on the last draft of what became Act 1 and told that he could stop work.

“Q Did they tell you why they thought that was sufficient?

A They did not specifically say John, Bill, these are the reasons why we are stopping at 19. I don't mean to be curt.

One of the prevailing themes throughout the exercise was to minimize the number of precinct incursions. We were at six. I worked with individuals who understand the election process. They understand the administration at the county level.

I do not profess to have any more than at best a superficial understanding of that. But the concern was to minimize the number of precinct incursions so that election administration would be as smooth as it could be.”

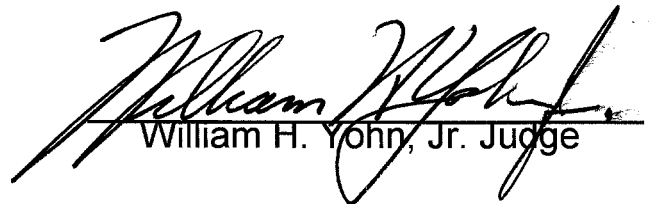
R. at 320 - 21.

Finally, I note that neither party has, even with the benefit of hindsight, submitted a plan following the general contours of Act 1 which does not involve the splitting of more than six voting precincts. Thus, I find that the inference defendants suggest, that the justification for Act 1 is the reduced number of voting precinct splits, is reasonable.

Plaintiffs, on the other hand, ask us to infer that the Act 1 plan was not “zeroed out” because of partisan considerations. Plaintiffs produced a map that was “zeroed out” without splitting any voting precincts, Alternative Four. However, this plan does not follow the general contours of Act 1. The Court has oftentimes reminded us of the necessity not to override state goals, policies and preferences any more than is necessary. *See Abrams v. Johnson*, 521 U.S. 74, 101 (1997); *Upham v. Seaman*, 456 U.S. 37, 41 - 42 (1982); *White v. Weiser*, 412 U.S. 783, 795 (1973). There is no evidence to support a conclusion that Alternative Four encompasses the many other state goals, policies and preferences inherent in Act 1 which resulted in its enactment. In addition, plaintiffs have suggested no connection between the nineteen person deviation in Act 1 and the alleged partisanship of the plan. Indeed, any such suggestion is contradicted by Dr. Memmi’s specific testimony that when he was trying to reduce the plan to the minimal population deviation possible on December 31, 2001, nobody expressed any concern that continuing to trade whole precincts might change the political characteristics of some of the districts and that during the entire procedure there was no commentary of a political nature. R. at 322. Moreover, to the extent that the plaintiffs are arguing partisan gerrymandering, the *Karcher* Court noted that “beyond requiring states to justify population deviations with explicit, precise

reasons, which might be expected to have some inhibitory effect, *Kirkpatrick* does little to prevent what is known as gerrymandering. . . . *Kirkpatrick's* object, achieving population equality, is far less ambitious than what would be required to address gerrymandering on a constitutional level.” *Karcher*, 462 U.S. at 734 n. 6. Thus, the inference which the plaintiffs ask us to draw is not supported by the evidence, by reason, or by law.

I conclude, therefore, that the nineteen person deviation was justified by the “legitimate state objective” of avoiding further splitting of voter precincts and that there has been no proof that the population deviation of nineteen persons bore any relationship to the alleged partisanship of Act 1. Thus, Act 1 is not unconstitutional.


William H. Yohn, Jr. Judge

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

April 8, 2002

Re: 1:01-cv-02439 Vieth v. Commonwealth of PA

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