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

FILED
HARRISBURG, PA

APR 11 2002

RICHARD VIETH and NORMA JEAN VIETH,

Plaintiffs

MARY E. D'ANDREA,
Per *[Signature]*
Deputy Clerk

v.

NO. 3:CV-01-2439

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

**(JUDGES RAMBO
& NYGAARD & YOHN)**

Defendants

**DEFENDANTS GOVERNOR SCHWEIKER, SECRETARY WEAVER
AND COMMISSIONER FILLING'S JOINDER IN THE
PRESIDING OFFICERS' EXPEDITED MOTION TO STAY,
PENDING APPEAL, THE ORDER GRANTING DECLARATORY
JUDGMENT AND INJUNCTION, AND EXECUTIVE OFFICERS'
MEMORANDUM OF LAW SUPPORTING A STAY**

Defendants Governor Schweiker, Secretary of the Commonwealth Weaver, and Commissioner Filling (the Executive Officers), through their undersigned counsel hereby join in Lt. Governor Jubelirer and Speaker Ryan's (the Presiding Officers) Expedited Motion for Stay Pending Appeal filed on this date in the above-captioned action.

The Executive Officers submit this memorandum of law in support of a stay. The Presiding Officers have also provided this Court with their own a memorandum of law supporting the Expedited Motion for Stay Pending Appeal. The Executive Officers submit this memorandum of law to address certain specific points.

When ruling on a motion for stay pending appeal, the Court must balance the equities and consider the following factors:

1. whether movant will likely prevail on the merits of the appeal;

2. whether movant will suffer irreparable harm if the stay is denied;
3. whether other parties will not be substantially harmed by the stay; and
4. whether the public interest will be served by granting the stay.

Harris v. Pernsley, 654 F.Supp. 1057, 1059 (E.D.Pa. 1987); *see also Republic of the Phillipines v. Westinghouse Electric Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). Each of these factors will be discussed in turn.

**THERE IS A REASONABLE POSSIBILITY
OF SUCCESS ON THE MERITS**

The success on the merits factor, does not require a court which has just rendered its assessment and decided the merits as it did, to determine that it was probably in error. Rather, what is necessary is a reasonable possibility, not a probability, that the Court was in error. *Harris v. Pernsley, supra*, at 1060.

The Executive Officers respectfully suggest that there is a reasonable possibility of success on the merits on appeal. This Court determined that Pennsylvania's congressional redistricting enactment, Act 1-2002 (Act 1) did not satisfy the one person / one vote requirement of Article I, §2 of the United States Constitution. In reaching that conclusion, the Court held that Act I did not meet the second test in *Karcher v. Daggett*, 462 U.S. 725 (1983). In *Karcher*, the United State Supreme Court outlined a two-part test for determining whether the one person / one vote requirement had been satisfied. Under the first part of the *Karcher* test, the party challenging the constitutionality of the congressional redistricting plan bears the burden of showing that the population differences among districts could have been

reduced to or eliminated by a good faith effort to draw districts of equal population. *Id.* at 730-731. The Court in *Karcher* makes very clear that if the first part of the test is satisfied, that “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.” *Id.* at 740 (emphasis added).

Defendants justified the deviations in Act I, *inter alia*, by a desire to avoid splitting voting precincts. Despite recognizing that the desire to avoid splitting precincts is a legitimate state objective, this Court rejected defendants' justification as pretext.¹ We respectfully suggest that this Court reached its conclusion by conflating the first and second *Karcher* test. In rejecting defendants' justification for the deviations in Act I, this Court stated:

...[T]he evidence has demonstrated that it is possible to draw a congressional district maps with zero deviation and no precinct splits.

* * *

. . . [I]t has been conclusively proven that it is possible to draw a congressional district map with zero population deviation amongst districts without splitting any precincts. Therefore, Defendants cannot rely on a general desire to avoid splitting precincts as a legitimate justification for a map that splits six such precincts. . . .

Court Opinion at pp. 8, 10 (emphasis added).

Under the first part of the *Karcher* test, the party challenging the constitutional congressional redistricting plan bears the burden of showing the

¹The Court, we believe, incorrectly introduced the element of motivation or intent into its one person / one vote analysis. While that element may be relevant in a partisan gerrymandering case, the sole remaining issue in this case concerned one person / one vote. In that context, the Court in *Karcher* made clear that the showing necessary to justify population deviation required a legitimate public interest being consistently applied to a plan. *Karcher v. Daggett*, 462 U.S. 725, 741 (1983).

population differences amongst districts could have been reduced or eliminated. This Court has held that plaintiffs met their burden by presenting an alternative map with a minimal population deviation. Opinion, p.5. However, once the first part of the *Karcher* test is met, the Court's focus must turn from alternative or possible plans and maps to the specific deviations in Act I. This Court held instead that defendants cannot rely on avoiding precinct splits to justify a map. Respectfully, the law does not require justification of a plan or map but justification for the specific deviations in Act I, the map or plan that had been enacted. The second *Karcher* test does not concern the reasons for, or means by which, Act I's district boundaries were determined; it concerns any justification for the minuscule population deviation across those enacted boundaries.

Defendants presented evidence to establish that one of its prevailing goals consistently applied throughout the Act I enactment was to minimize the number of precinct splits. TR. at 320-321 (Memmi). The defendants also presented evidence that if the deviations in Act I are reduced to the mathematical minimum, those reductions district-by-district cause a corresponding increase in precinct splits more than quadrupling the number of such splits. (Defendants' Exhibit 99).

The Executive Officers respectfully suggest that in conflating the first and second *Karcher* test, the Court has committed an error of law. Therefore, there is a possibility of success on the merits on appeal.

**DEFENDANTS WILL SUFFER IRREPARABLE HARM
IF A STAY IS DENIED**

The Pennsylvania Election Code is a complex statutorily required process full of inter-related actions that must occur in a specific order. Any disruption disrupts the process as a whole. If a stay is not granted, irreparable harm will be done to that election process.

Pursuant to the Court's order, the General Assembly is to enact a new plan by April 29. The primary date is currently scheduled for May 21, 2002. As detailed below, the election process includes certain actions as well as the opportunity to raise objections to those actions and subject them to judicial oversight. This process cannot be concluded in the three weeks, from April 29 to May 21. Accordingly, implementation of the Court's order would require either having two separate primaries, one for congressional offices and one for state offices; or postponing the primary date for all offices. To identify the nature of the harm caused by either alternative, the Executive Officers will briefly review one aspect of the election process.

The election process, with respect to public participation in nominating candidates, began February 19, 2002, the first day to circulate and file nomination petitions. 25 P.S. §2868.² March 19, 2002 was the last day to file objections to those nomination petitions. 25 P.S. §2937. March 22, 2002 is the last day that may be

²The process actually began on January 22, 2002, the last day any political party may file in the Office of the Secretary of the Commonwealth a certified copy of party rules. 25 P.S. §2838.1.

fixed by the Court of Common Pleas or the Commonwealth Court of Pennsylvania for hearings on objections that have been filed to nomination petitions. *Id.* March 27 is the last day, if possible, for the Court of Common Pleas or the Commonwealth Court to render decisions in cases involving those objections.^{3 4}

Also on April 1, County Boards of Election must begin sending absentee ballots to certain military personnel. Other absentee ballots are required to be sent out by the County Boards of Election to other military personnel by April 8. Though not part of the election code, some county boards may have started the process of printing their ballots.

All of the preceding occurred prior to this Court's order. In the absence of a stay, it will have to be duplicated. If the primary process is split into two separate primaries, then the process outlined above will have to be duplicated with respect to the congressional offices. That duplication will involve the candidates, the parties, and the public at large as well as local, county, and state agencies and official involved in the election process. Moreover, separate primaries would double the resources, financial, administrative, and personnel, necessary to actually hold two separate elections in 9,426 precincts.

³In fact, one of those objections remains outstanding to date.

⁴This analysis has focused on the process arising out of nominating petitions for the major parties. Other aspects of the election process will be effected by a change in the primary. For example, the last day to register to vote is dependent upon the date of the primary. 25 P.S. 1961.526(b). A change in the primary may require changing software in Pennsylvania's seventy-eight voter registration facilities. The organizational meetings of the political parties is also set and dependent upon the date of the primary. 25 P.S. §2834.

Even if the primary is not split but postponed, the process to date will still have to be duplicated for the congressional offices. In addition, while not splitting the primary would save the cost of holding two separate elections, it would still require the expending of resources, financial, administrative, and personnel to move all the mechanics of the election and personnel to the new date and potentially different facilities. All of this in direct contravention of the Pennsylvania Election Code; a statutory enactment of the General Assembly.

Any time a state is enjoined from effectuating a statute as enacted by representatives of the people, it suffers a form of irreparable harm. *New Motor Vehicle Board of California v. Fox*, 434 U.S. 1345, 1351 (1977) (Rehnquist as circuit justice). In *Reynolds v. Sims*, 377 U.S. 533 (1963), the United States Supreme Court stated that:

. . . [W]here an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the grant of immediate effective relief in a legislative reapportionment case even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of the state election laws, and should act and rely upon general equitable principles.

Id. at 585. In the context of granting a stay in the face of a redistricting plan having been declared unconstitutional, Justice Brennan, balancing the equitable principles outlined in *Reynolds v. Sims*, and the relative harms to applicants and respondents held that:

Applicants would plainly suffer irreparable harm were the stay not granted. Under the district court order, the legislature must either adopt an alternative redistricting plan before March 22 or face the prospect

that the district court will implement its own redistricting plan. With respect to the balance of the equities, this Court has repeatedly emphasized legislative reapportionment plans created by the legislature are to be preferred to judicially constructed plans.

Karcher v. Daggett, 455 U.S. 1303, 1306-1307 (1982) (Justice Brennan as circuit justice). In the absence of a stay, defendants, the election process itself, and the public interest will suffer irreparable harm. Granting the stay will allow the normal election cycle as well as the appeal to proceed without that harm.

OTHERS WILL NOT BE SUBSTANTIALLY HARMED BY THE STAY

In contrast to the harm suffered if a stay is not granted there will be no substantial harm by the granting of that stay. Not only is there no substantial harm but, as a matter of equity, there is no discernable harm. A population deviation across the Commonwealth of nineteen persons in a redistricting act encompassing 12,291,054 persons present no discernable harm. The Executive Officers respectfully suggest that it is hard to imagine any situation where the balance of the equities could be more in favor of granting a stay.

THE PUBLIC INTEREST WILL BE SERVED BY GRANTING THE STAY

The proceeding weighing of the potential harm in not granting a stay versus granting one, we believe clearly establishes that a stay is in the public interest.


CONCLUSION

Based on the foregoing, the Executive Officers respectfully request that this Court grant their motion for a stay pending appeal to the Supreme Court, and allow the election process to proceed uninterrupted.

Respectfully submitted,

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DATED: April 11, 2002

CERTIFICATE OF SERVICE

I, **J. BART DeLONE**, Senior Deputy Attorney General for the Commonwealth of Pennsylvania, hereby certify that on April 11, 2002, I caused to be served a copy of the foregoing document entitled **Defendants Governor Schweiker, Secretary Weaver and Commissioner Filling's Joinder in the Presiding Officers' Expedited Motion to Stay, Pending Appeal, the Order Granting Declaratory Judgment and Injunction, and Executive Officers' Memorandum of Law Supporting a Stay**, upon the following:

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