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

**FILED**  
HARRISBURG, PA

OCT 14 2002

JERRY E. D'ANDREA,  
Deputy Clerk

**RICHARD VIETH and NORMA  
JEAN VIETH,**

**Plaintiffs**

v.

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

**Defendants**

**NO. 1:CV-01-2439**

**(JUDGES RAMBO  
NYGAARD & YOHN)**

**DEFENDANTS GOVERNOR SCHWEIKER, SECRETARY WEAVER  
AND COMMISSIONER FILLING'S JOINDER  
IN THE PRESIDING OFFICERS' MEMORANDUM IN SUPPORT  
OF MOTION TO OFFER EVIDENCE**

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) Memorandum in Support of Motion to Offer Evidence. The Executive Officers write separately to address certain specific points.

**BACKGROUND**

Because of the 2000 decennial census, Pennsylvania's congressional delegation was reduced from 21 to 19 representatives. In response, the Pennsylvania General Assembly enacted and Governor Schweiker, on January 7, 2002, signed Act 2002-1, 25 P.S. §§ 3595.1 to 3959.6 (Act 1). Act 1 created nineteen congressional districts, with an overall population deviation from absolute equality of 19 persons. Sections 1(3) and 1(12) of Act 1 provided that the Third Congressional District would

include the “South Buffalo District Western”<sup>1</sup> in Armstrong County while the “South Buffalo District Eastern” would be part of the Twelfth Congressional District. 25 P.S. §§ 3595.1(3) and (12).

On April 8, this Court declared Act 1 to be unconstitutional on the grounds that the 19 person deviation violated the one person-one vote principle. The Court enjoined Act 1's implementation. Subsequent to this Court's order, the General Assembly, on April 17, 2002, enacted a bill containing a revised redistricting plan. On April 18, 2002, Governor Schweiker signed the bill into law as Act 2002-34. 25 P.S. §§ 3595.101-2595.505 (Act 34). Act 34 repealed Act 1<sup>2</sup> and put in place a revised congressional redistricting plan. Act 34 makes no change from Act 1's use of both the South Buffalo District's Western and the South Buffalo District Eastern as part of the boundary between the Third and Twelfth Congressional Districts. 25 P.S. §§ 3595.301(3) and (12).

On April 22, 2002, plaintiffs moved for the commencement of a remedial hearing. Plaintiffs claimed that Act 34 violated the one person-one vote principle. Plaintiffs allege that due to a change of voting, district boundary in Armstrong County's South Buffalo District, there is a 97 person deviation in Act 34. The change was allegedly brought about by a petition filed on February 19, 2002 by the

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<sup>1</sup>An election district is Pennsylvania's designation for what is commonly referred to as a precinct.

<sup>2</sup>On April 23, 2002, this Court stayed its April 8 injunction allowing the 2002 congressional elections to be conducted under Act 1. Under §1503(2) of Act 34, Act 1 will be repealed after the current election cycle. Thereafter, Act 34 will be effective. 25 P.S. §3595.501.

Armstrong County Board of Elections (the Board) and was approved by the Court of Common Pleas of Armstrong County by order dated March 15, 2002.

On April 23, 2002, this Court set a hearing “for the purpose of determining whether Act 34 suitably remedies the constitutional violations found by this Court in its order of April 8, 2002.” This Court subsequently stayed that hearing after being advised that the Board had petitioned the Armstrong County Court of Common Pleas to vacate its March 15 order. On July 29, 2002, the Court of Common Pleas for Armstrong County denied the Board's petition to vacate its March 15 order.

This Court, by order dated September 13, 2002, has now scheduled a hearing regarding the constitutionality of Act 34 for October 15, 2002..

**THE COURT OF COMMON PLEAS OF  
ARMSTRONG COUNTY LACKS THE AUTHORITY  
AS A MATTER OF FEDERAL CONSTITUTIONAL  
LAW TO ALTER CONGRESSIONAL DISTRICTS**

The issue now presented to this Court is whether Act 34 satisfies the one person-one vote requirement of Article I, §2 of the United States Constitution. Plaintiffs allege that Act 34 has a population deviation. As support for this allegation, plaintiffs rely on the March 15, order of the Court of Common Pleas of Armstrong County. The Court of Common Pleas of Armstrong County as a matter of federal, constitutional law, has no authority to alter Congressional Districts.

The United States Constitution gives authority to state legislatures to establish the time, place, and manner for electing members of Congress. United States Const., Art. I, §4, cl. 1 (“times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature

thereof”). This authority includes the power and duty of state legislators to divide a state into congressional districts in accordance with the most recent federal decennial census apportioning congressional seats accordingly. The United States Supreme Court has held the division of a state into congressional districts is inherently a political process to be done by state legislators. *White v. Weiser*, 412 U.S. 783, 795-96 (1973) (“from the beginning, we have recognized that ‘reapportionment is primarily a matter for legislative consideration and determination’; . . . [d]istricting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task”) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).

As a matter of federal constitutional law, the task of federal redistricting is left to state legislatures. Allowing local county courts to alter congressional districts would take congressional redistricting out of the hands of the Pennsylvania General Assembly where it is constitutionally vested. It would also be contrary to the one person-one vote principle if local county courts in Pennsylvania had such authority, the 60 courts of common pleas would be able at any time to alter election district boundaries that effect Congressional Districts and potentially create multiple population deviations. The prospect of such chaos is precisely why the authority to define the boundaries of Congressional Districts is left to each state's legislature.

**ACT 34 IS A ZERO DEVIATION PLAN**

Whatever the authority of the Armstrong County Court of Common Pleas, its order does not change the legislative intent of the Pennsylvania General Assembly in enacting Act 34. That intent as a matter of law establishes that Act 34 must be construed as a zero deviation plan.

Plaintiffs assert that the meaning of the terms South, Buffalo District Eastern and Western as used initially in Act 1 was somehow changed by the Armstrong County Court of Common Pleas order of March 15. These terms had very specific meaning in Act 1. In enacting Act 1, the Pennsylvania General Assembly used the 2000 federal census population data as assigned to both voting districts by the Legislative Data Processing Center (LDP), a bipartisan legislative entity.<sup>3</sup>

Plaintiffs suggest that while the language of Act 1 was clear with a single meaning, the actions of the Armstrong County Court of Common Pleas changed the meaning of the same language in Act 34. The meaning of the language in both Act I and Act 34 remains the same. In order to resolve this latent ambiguity<sup>4</sup>, this Court

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<sup>3</sup>The census data provides the only reliable indication of a congressional district's relative population levels. The census data represents the best population data available. It is the only basis for good faith attempts to achieve population equality. *Karcher v. Daggett*, 462 U.S. 725, 738 (1983). Because the federal census population data is presented in terms of population per block that does not correspond with the boundaries of Pennsylvania's voting districts the census data as assigned by the LDP is used by the General Assembly in congressional redistricting. *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204, 205 (1992).

<sup>4</sup>A patent ambiguity is that which arises from the defective or obscure or insensible language used. A latent ambiguity arises from extraneous or collateral facts which make the meaning of the language uncertain although the language on its face appears clear. *Krizovensky v. Krizovensky*, 424 Pa. Super. 204, 624 A.2d 638,

must turn to Pennsylvania's rules of statutory construction.<sup>5</sup> *Commonwealth v. McPhail*, 547 Pa. 519, 692 A.2d 139, 148 (1997) (Cappy, J., concurring).

The cardinal rule of all statutory construction is to ascertain and effectuate the intent of the General Assembly. To determine that intent statutory language is not to be read in isolation but must be read with reference to the context in which it appears. *O'Rourke v. Commonwealth*, 566 Pa. 161, 778 A.2d 1194, 1201 (2001) (citing 1 Pa.C.S. §1921(a)).<sup>6</sup> The meaning of statutory language is determined by reference not simply to the language itself and the specific context in which the language is but also the broader context of the statute as a whole. *Food and Drug Administration v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000); *see also Ford v. Schering-Plough Corp.*, 145 F.3d 601, 606 (3d Cir. 1998).

To place statutory language in its proper context courts are to

Look to the occasion and necessity of the statute, the circumstances in which it was enacted, the mischief to remedied, and object to attained by the law, former law on the same subject, and what the consequences of a particular interpretation would be. 1 Pa.C.S. §1921(c)(1)-(6).

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643 (1993).

<sup>5</sup>Federal courts are to look to a state's rules of statutory construction in interpreting its statutes. *Figueras v. Buccaneer Hotel, Inc.*, 188 F.3d 172, 179 n.6 (3d Cir. 1999); *United States v. Parise*, 159 F.3d 790, 799 (3d Cir. 1998); *A.J. Cunningham Packaging Corp. v. Congress Financial Corp.*, 792 F.2d 330, 334 (3d Cir. 1986).

<sup>6</sup>In addition to case law, principles of statutory construction are codified in Pennsylvania law under the Statutory Construction Act, 1 P.S. §1501-1991.

*Commonwealth v. Davis*, 421 Pa. Super. 454, 618 A.2d 426, 428, 429 (1992); *see also O'Rourke v. Commonwealth*, *supra*, at 1201. In addition, it is presumed that the General Assembly did not intend a result that is absurd or unreasonable, nor one that would be violative of the United States Constitution. It is also presumed that the General Assembly intends to favor the public interest. *Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 541 Pa. 425, 664 A.2d 84, 87 (1995) (citing 1 Pa.C.S. §1922).

The canons of statutory construction require that a statute be read in a manner which will effectuate its purpose, a task which compels consideration of more than the statute's literal words. In ascertaining this legislative purpose, especially when the act in question is a manifestation of a fundamental policy of the Commonwealth, courts may properly consider the historical setting which gave impetus to its enactment. Thus, even if we assume *arguendo* that the interpretation we may have adopted is not apparent solely from the wording of the statute any *latent ambiguity* disappears once we examine the circumstances of its passage.

*Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290, 295 (1967) (citations omitted, emphasis added).

Applying these principles to Act 34, the latent ambiguity of the meaning of the phrases South Buffalo District and Eastern and Western disappears once we examine the circumstances of Act 34's enactment. Act 34's enactment was in direct response to this Court's April 8 decision finding that Act 1 had a deviation that violated the one vote-one person principle. The occasion that necessitated Act 34's passage was to enact a zero deviation plan; that was the mischief to be remedied and the object to be attained. To effectuate this purpose and carry out this fundamental policy of the Commonwealth, Act 34 uses precisely the same language with respect



to the boundaries of the Third and Twelfth Congressional Districts as Act 1, the former law on the same subject. Those terms have precisely the same meaning in Act 34 as they had in Act 1.

To interpret these terms as somehow having different meanings from Act 1 to Act 34 would not only take those phrases out of Act 34's broadest context, to effectuate a zero deviation plan, but would also violate another basic principle of statutory construction; the requirement that courts must construe the General Assembly's legislative enactments, where possible, as in compliance with the constitution. *Herrington v. Commonwealth, Department of Transportation*, 563 Pa. 565, 763 A.2d 386, 393 (2000). Moreover, it is also presumed that the General Assembly intends to favor the public interest. *Baumgardner Oil Co. v. Commonwealth*, 146 Pa. Cmwlth. 530, 606 A.2d 617, 624, appeal denied, 531 Pa. 648, 612 A.2d 986 (1992). Such a construction of Act 34 would also result in the absurd and unreasonable conclusion that a statute that was specifically designed creates a zero deviation plan did precisely the opposite. Finally, this Court must consider what the consequences of such an interpretation would be.

Application of all of these principles of statutory construction establishes that the General Assembly in its enactment of Act 34 clearly intended that the terms South Buffalo District and Eastern and Western would remain as defined by the LDP and used in Act 1.

The latent ambiguity of Act 34 disappears once we examine the circumstances of its passage. It is not just that the General Assembly's clear intent in



enacting Act 34 was to create a zero deviation plan or that they certainly made a good faith effort to enact a zero deviation plan. It is not just that the General Assembly thought they were enacting such a plan. It is that by their legislative intent, that is precisely what the General Assembly did. Act 34 must be construed as what it is — a zero deviation plan.

### **KARCHER TEST**

If this Court were to construe the terms of Act 34 in a way other than what the General Assembly clearly intended, then the Court must determine whether under this construction, Act 34 satisfies the one person-one vote requirement of the United States Constitution.

### **Good Faith**

In *Karcher v. Daggett*, 462 U.S. 725 (1983), the United States Supreme Court outlined a two-part test for determining whether the one person-one vote requirement of Article I, §2 of the United States Constitution has been satisfied. Under the first part of the “*Karcher* test” the party challenging the constitutionality of a congressional redistricting plan bears the burden of showing that the population differences among districts could have been reduced or eliminated by a good faith effort to draw districts of equal population. *Id.* at 730-731.

The good faith element of the *Karcher* test concerns the “effort to draw districts of equal population.” *Id.*

[T]he as nearly as practicable standard requires that the State make a good faith effort to achieve precise mathematical equality. Unless population variances among congressional districts *are shown to have*

*resulted despite such effort*, the State must justify each variance no matter how small.

*Id.* at 730 (emphasis added, internal quotations and citations omitted). It is plaintiff's burden to show that the alleged deviations in Act 34 occurred because of the lack of a good faith effort by the General Assembly to draw such congressional districts. Act 34 is as a matter of law a zero deviation plan. Should this Court determine that it is not, it is nevertheless clear that the Pennsylvania General Assembly made every effort and in fact believed that Act 34 was a zero deviation plan.<sup>7</sup> To the extent that this Court determines that Act 34 has a population deviation, that deviation arises from the actions of the Board and Armstrong County. Those deviations did not result from the lack of a good faith effort by the General Assembly to draw districts of equal population but despite those efforts.

### **Justification**

Should this Court determine that any deviation in Act 34 resulted from the lack of a good faith effort by the General Assembly to draw districts of equal population rather than despite those efforts, those deviations can nevertheless be justified.

The law requires that if the first part of the *Karcher* test is met, the Court's focus must turn to the population deviations in the specific plan enacted by

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<sup>7</sup>Pursuant to Pennsylvania law, the Board is required by 25 P.S. §2747(b) of the Pennsylvania Election Code to file with the Pennsylvania Department of State's Bureau of Commissions, Elections, and Legislation (the Bureau) a report of changes made to election districts. The Bureau is required to maintain these reports and their amendments for the use of the General Assembly and the public. 25 P.S. §2748(b). The Board failed to file a report.

the legislature and justifications for any of those specific deviations. The burden shifts “to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective.” *Karcher, supra*, at 740.

As detailed above, Act 34 as enacted by the General Assembly had no deviation. However, to the extent that this Court imputes the actions of the Board and Armstrong County to the General Assembly under Pennsylvania law the reasons Armstrong County sought and received the order from the Armstrong County Court of Common Pleas must also be imputed to the General Assembly. *G.F. Corporation v. Amchem Products, Inc.*, 399 F.Supp. 647, 656 (E.D.Pa. 1975), rev'd on other grounds, 570 F.2d 457 (3d Cir. 1978) (once a party is deemed to be on inquiry notice, that party is also deemed to have knowledge of all facts that an inquiry pursued with ordinary diligence and understanding would have disclosed).

The March 15 order of the Court of Common Pleas of Armstrong County was sought so as to move the Northpoint Industrial Park into the district of Representative John Murtha. It was felt by Armstrong County that placement of the industrial park into Congressman John Murtha's district, as Pennsylvania's most senior representative and senior member of the Appropriations Committee, would aide in the community's economic development.

This Court recognized in its April 8 decision “that the burden borne by states varies inversely with the magnitude of the population deviation.” (Citing *Karcher, supra*, at 741). See also *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections Law*, 781 F.Supp. 394, 397

(D.Md. 1991), aff'd 504 U.S. 938 (1992) (the amount and degree of justification which the state must establish is roughly equal to the amount of the deviation itself)).

The deviations alleged to exist pursuant to Armstrong County's action are 78 people. That minuscule deviation is directly related to the goal of economic development. Such economic development is a legitimate state objective. That objective justifies the deviation.


**CONCLUSION**

For the reasons set forth above, this Court should conclude that Act 34 remedies the constitutional violations this Court found in Act 1.

**Respectfully submitted,**

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**BY:**

  
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**DATED: October 4, 2002**

**CERTIFICATE OF SERVICE**

I, **J. BART DeLONE**, Senior Deputy Attorney General for the Commonwealth of Pennsylvania, hereby certify that on October 4, 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' Memorandum in Support of Motion to Offer Evidence**, upon the following:

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