> . . . . [A]ppellees 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.

Id. at 740 (emphasis added). The law clearly requires that if the first part of the *Karcher* test is met, the party's focus as well as the court's must turn to the population deviations in Act 1 and justification for any of those specific deviations.

The Court in *Karcher* outlines what is necessary to satisfy its justification requirement.

> *White v. Weiser* [412 U.S. 783 (1973)] demonstrates that we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts.

Karcher v. Daggett, supra, at 740. The Court in *Karcher* goes on to list a number of such legislative policies but makes clear that its listing is far from exclusive.

> *Any number* of consistently applied legislative policies might justify some variance, including, *for instance*, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives. As long as the criteria are non-discriminatory, these are all legitimate objectives that on a proper showing could justify minor population deviations.

Id. (citations omitted) (emphasis added). *See also Stone v. Hechler*, 72 F.Supp. 1116, 1124 (N.D. W.Va. 1992) (*Karcher* did not specify how the State might meet its burden in Step Two. It did give several examples of legislative policies that might justify some variance among the populations of the State's various congressional districts.)

ORIGINAL

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

RICHARD VIETH and NORMA JEAN VIETH, Plaintiffs	:	
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' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND POST HEARING BRIEF

Defendants Governor Schweiker, Secretary of the Commonwealth Weaver[1], and Commissioner Filling (collectively the Executive Officers), through their undersigned counsel hereby join in Lt. Governor Jubelirer and Speaker Ryan's (the Presiding Officers) Proposed Findings of Fact and Conclusions of Law and Post Hearing Brief filed on this date in the above-captioned action.

The Presiding Officers have provided this Court with an extended analysis. Rather than simply repeat that analysis, the Executive Officers write separately to address certain specific points.

The sole remaining issue to be resolved by this Court is whether Pennsylvania's congressional redistricting enactment, Act 1-2002 (Act 1), satisfies the one person/one vote requirement of Article I, §2 of the United States Constitution. In *Karcher v. Daggett*, 462 U.S. 725 (1983), the United States Supreme Court

[1]When this action was initiated, Kim Pizzingrilli was Secretary of the Commonwealth. She has now resigned. C. Michael Weaver is the Acting Secretary of the Commonwealth and by operation of Fed.R.Civ.P. 25(d)(1) is automatically substituted as a party to this action.

outlined a two-part test for determining whether the one person/one vote requirement of Article I, §2 has been satisfied. "Article I, §2 therefore, 'permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or *for which justification is shown'*." *Karcher, supra* at 730.

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 altogether by a *good faith effort to draw districts of equal population*." *Id.* at 730-731 (emphasis added). The Presiding Officers have presented a detailed analysis of precisely what plaintiffs had established to meet their burden. The good faith element of the first part of the *Karcher* test concerns the effort to "draw districts of equal population." The evidence establishes that such a good faith effort to draw districts of equal population was made. Accordingly, plaintiffs cannot satisfy their initial burden. That analysis will not be restated. Instead, the Executive Officers assuming *arguendo* that plaintiffs had in fact satisfied the first prong of the *Karcher* test, and wish to emphasize precisely what the State's burden in satisfying the second part of the *Karcher* test is and how it has been satisfied in this action.

A. REDUCING PRECINCT SPLITS JUSTIFIES THE MINUSCULE DEVIATION IN ACT 1

Having assumed that the first part of the *Karcher* test has been satisfied, the second part of the *Karcher* test requires justifying population deviations with particularity. *Karcher, supra* at 739. The law is also specific as to what those particular justifications are to address.

With respect to the showing necessary to justify population deviations, the Court concluded by stating:

> The showing required to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interest, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

Id. at 741. *See also Anne Arundel County Republican Central Committee v. The State Administrative Board of Election Laws*, 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).

Applying these principles to the deviations in Act 1, those deviations are minuscule. Under Act 1, no district is more than 10 persons above or below the "ideal" population of 646,371; and the total deviation from the ideal — that is, the difference between the most and least populous districts — is 19 persons, or 0.0029%. (Deft. Ex. 53). The General Assembly had as one of its legislative policies consistently applied in enacting Act 1 to keep precinct splits to a minimum. (Tr. at 298 Memmi). Such precinct splits cause a variety of administrative problems in the conduct of elections. (Tr. 343-355, Marion). Because of these administrative problems, a redistricting plan should minimize precinct splitting when possible. *Wesch v. Hunt*, 785 F.Supp. 1491, 1496 (S.D. Ala. 1992), *aff'd. sub nom, Camp v. Wesch*, 504 U.S. 902 (1992).

Again, the focus of the second part of the *Karcher* test is justification for *the deviations in Act 1*. Those deviations reflect a legitimate non-discriminatory

redistricting policy objective of a limiting precinct splits. Under Act 1, six precincts are split by assigning the census blocks within the precinct to different congressional districts, which affects six counties, six municipalities, and nine of nineteen congressional districts. (Deft. Ex. 98). If the deviations in Act 1 are reduced to the mathematical minimum, those reductions, district-by-district cause a corresponding increase in precinct splits which affects twelve counties rather than six, sixteen municipalities rather than six, seventeen of nineteen congressional districts, and more than quadruples the number of precinct splits from six to twenty-six. (Deft. Ex. 99). (Tr. at 313 Memmi).

In *Karcher*, the United States Supreme Court affirmed the district court's conclusion that "appellant did not justify the population deviations in . . . [the Feldman plan (the duly enacted redistricting legislation)]. At argument before the District Court and on appeal in this Court, appellants emphasized only one justification for the Feldman plan's population deviation — preserving the voting strength of racial minority groups." *Karcher v. Daggett, supra*, at 742.

> . . . Under the Feldman plan, the largest districts are the fourth and ninth districts and the smallest are the third and sixth. None of these districts borders on the tenth and only one — the fourth — is even mentioned in appellant's discussion of preserving minority voting strength. Nowhere do appellants suggest the large population of the fourth districts was necessary to preserve minority voting strength; in fact, the deviation between the fourth and the other districts has the effect of diluting the votes of all residents of that district, including members of racial minorities, as compared with other districts with fewer minority voters. The record is completely silent on the relationship between preserving minority voting strength and the small populations of the third and sixth districts. Therefore, the district court's finding easily passes the clearly erroneous test.

Id. at 743-744 (internal quotations omitted).

Unlike *Karcher*, defendants have established that the minuscule population deviations in Act 1 limit the number of precinct splits. This is not a case where an unjustified deviation renders a redistricting plan constitutionally infirm. This is a case in which the General Assembly made a decision to accept a minuscule deviation from the ideal in order to serve a recognized countervailing interest. Reducing precinct splits justifies the minuscule deviations in Act 1. Act 1 satisfies the second *Karcher* test and meets the one person/one vote requirement of Act I, §2 of the United States Constitution.

B. THE DEVIATIONS IN ACT 1 HAVE BEEN JUSTIFIED. THEREFORE, NO REMEDIAL ACTION IS NECESSARY. IN THE ABSENCE OF SUCH JUSTIFICATIONS, ANY REMEDIAL ACTION BY THE COURT SHOULD DEFER TO THE LEGISLATIVE JUDGMENT THAT ACT 1 REFLECTS.

The defendants have presented justification for the minuscule deviations in Act 1 sufficient to satisfy Article I, §2 of the United States Constitution. Therefore, no remedial action is necessary. Assuming *arguendo* that plaintiffs had met the first part of the *Karcher* test, and defendants had not presented such justification, the United States Supreme Court has been very explicit as to what types of remedial actions are to be taken to rectify constitutional violations.

> Just as a federal district court in the context of legislative reapportionment, should follow the policies and preferences of the state, as expressed in statutory and constitutional provisions or in the reapportionment plan proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor

> state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should no preempt the legislative task nor intrude upon state policy any more than necessary.

White v. Weiser, 412 U.S. 783, 795 (1973). Subsequently, the Court after quoting *Weiser* in *Upham v. Seamon*, 456 U.S. 37 (1992), stated:

> *Weiser* itself presents a good example of when such an intrusion [upon state policy] is not necessary. We held there that the District Court erred when in choosing between two possible court ordered plans, it failed to choose the plan which most closely approximated the state's proposed plan. The only limits on judicial deference to state apportionment policy we held, were the substantive constitutional and statutory standards to which such state plans are subject.
>
> * * *
>
> . . . [A] district court erred in fashioning a court ordered plan that rejected state policy choices more than what was necessary to meet the specific constitutional violations involved . . ..

Id. at 42.

Plaintiffs have suggested in other filings with this Court that the principles enunciated in *Upham* and *Weiser* somehow require that any court in choosing between possible court ordered plans use the plan which does not most closely approximate the state's enacted plan. As support for this assertion, plaintiffs have cited to *Daggett v. Kimmelman*, 580 F.Supp. 1259 (D.N.J. 1984). In that case, the district court did reject a specific alternative plan. However, the court explained why; "First, it does not achieve as small an overall or mean deviation as any other plans which are in evidence." *Id.* at 1262.

> Moreover, *White v. Weiser* teaches that "the district court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge." The State policy embodied in the Feldman plan was to *deviate from the*

> *norm of population equality* for the pattonly discernable-purpose of partisan advantage.

Id. at 1263 (emphasis added). The court rejected the plan in question because no justification for the "deviate[ion] from the norm of population equality" was offered and because the plan in question did not have the lowest deviation. The factors that distinguish *Daggett v. Kimmelman* from *White v. Weiser* are not present in this action.

In *Abrams v. Johnson*, 521 U.S. 74 (1997), the Court reiterated:

> When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act.

Id. at 79. After citing to *Upham*, the Court went on to hold that

> In the absence of a finding that the legislature's reapportionment plan offended either the Constitution or the Voting Rights Act, we held, the district court "was not free to disregard the political program of the state legislature."

Id. at 85 (citing *Upham* and *White v. Weiser*).

Applying these principles to the present action defendants, in justifying the minuscule deviations in Act 1 created a modified Act 1, with the minimum deviation mathematically possible. (*See* Deft. Ex. 90). Unlike *Daggett v. Kimmelman*, defendants here have presented a detailed justification for each of the deviations in Act 1. If no such justifications had been presented, however, a court errs in fashioning a court ordered plan that rejects state policy choices more than is necessary to meet the specific constitutional violation involved. *Upham, supra*, at 42.

The only constitutional claim here is one person/one vote. The modified Act 1, in the absence of justification is all that is necessary to meet that specific constitutional violation.

No remedial action is necessary here. If remedial action were necessary, any court ordered plan should adopt the modified Act 1.

CONCLUSION

The Executive Officers join with the Presiding Officers in Proposed Findings of Fact and Conclusions of Law and Post Hearing Brief.

Respectfully submitted,

D. MICHAEL FISHER
Attorney General

BY: 

J. BART DeLONE
Senior Deputy Attorney General
I.D. No. 42540

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Appellate Litigation Section

Office of Attorney General
Appellate Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-3226

DATED: March 15, 2002

CERTIFICATE OF SERVICE

I, **CALVIN R. KOONS,** Senior Deputy Attorney General for the Commonwealth of Pennsylvania, hereby certify that on March 15, 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' Proposed Findings of Fact and Conclusions of Law and Post Hearing Brief,** upon the following:

VIA FAX & FIRST-CLASS MAIL:

Robert B. Hoffman, Esquire
Reed Smith, LLP
213 Market Street, 9th Floor
P.O. Box 11844
Harrisburg, PA 17108
(717) 236-3777 - Fax

John P. Krill, Jr., Esquire
Linda J. Shorey, Esquire
Julia M. Glencer, Esquire
Jason E. Oyler, Esquire
Kirkpatrick & Lockhart LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4501 - Fax

Paul M. Smith, Esquire
Thomas J. Perrelli, Esquire
Daniel Mach, Esquire
Brian P. Hauck, Esquire
Jenner & Block, LLC
601 Thirteenth Street, NW
Washington, DC 20005
(202) 639-6066 - Fax

VIA FIRST-CLASS MAIL:

The Hon. Richard L. Nygaard
U.S. Circuit Judge
717 State Street, Suite 500
Erie, PA 16501

The Hon. William H. Yohn, Jr.
U.S. District Judge
3809 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1753

CALVIN R. KOONS
Senior Deputy Attorney General
I.D. No. 32536