

214

10/10/02
vlg

2 to ct

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

RICHARD VIETH, *et al.*,

Plaintiffs,

v.

COMMONWEALTH OF
PENNSYLVANIA, *et al.*,

Defendants.

ROBERT J. MELLOW, Senator, 22nd
District,

Amicus Curiae.

Civil No. 1:CV-01-2439

Judge Rambo

FILED
HARRISBURG, PA

OCT 9 2002

MARY E. D'ANDREA, CLERK
Per _____
Deputy Clerk

**MEMORANDUM IN SUPPORT OF
MOTION TO STAY PENDING RESOLUTION OF
STATE COURT PROCEEDING CONCERNING REDISTRICTING**

INTRODUCTION

Senator Robert J. Mellow, on behalf of the Senate Democratic Caucus, respectfully requests that this Court stay the present case pending a decision in *Mellow v. Schweiker, et al.*, a redistricting case filed by Senator Mellow in the Commonwealth Court of Pennsylvania (the "State Court Litigation"). Like the present case, the State Court Litigation seeks a decision concerning the

constitutionality of Act 34 of 2002, Pennsylvania's congressional redistricting plan ("Act 34"). In particular, the State Court Litigation, like the present case, asks the court to declare that Act 34 violates the "one person, one vote" principle and to enjoin implementation of Act 34. As discussed more fully below, principles of federalism and comity require that, once a state court has begun to act on issues related to apportionment of voting districts, a federal court hearing a case pertaining to the same issues should stay its hand. *Grove v. Emison*, 507 U.S. 25 (1993). In accordance with *Grove*, Senator Mellow respectfully seeks such a stay here.

STATEMENT OF FACTS

As this Court knows, following its declaration that Act 1, the General Assembly's first congressional redistricting plan, violated the "one-person, one vote" principle, the Defendants appealed this ruling to the Supreme Court, and the General Assembly passed a new plan, House Bill 2545, which, on April 18, 2002, the Governor signed into law as Act 34. Although Act 34 purported to cure the defects in Act 1, in fact, Act 34 has an even larger population deviation than Act 1. Specifically, by virtue of a March 15, 2002, order of the Armstrong County Court of Common Pleas that changed election district boundaries in South Buffalo Township, Act 34 has a deviation of 97 people.

As this Court also knows, the Armstrong County Board of Elections petitioned the Armstrong County Court of Common Pleas to vacate its March 15 order and to restore the boundary line between the two election districts in South Buffalo Township to its prior location. On July 29, 2002, however, the petition

was denied. This denial removed all remaining doubt about the location of the boundary line and thus the existence of a deviation in Act 34. On September 13, following briefing on the status of the Armstrong County matter, this Court set a hearing for October 15 on the constitutionality of Act 34.

Meanwhile, on May 6, 2002, Senator Mellow moved, on behalf of the Democrats in the Pennsylvania Senate, for leave to intervene in the remedial phase of the present case or, in the alternative, to participate as *amicus curiae*. On September 13, this Court granted his motion to participate as *amicus curiae*, but denied his motion to intervene. On October 7, the Supreme Court dismissed the Defendants' appeals as moot.

As a result of the Supreme Court's action and this Court's denial of his motion to intervene, on October 9, 2002, Senator Mellow filed the State Court Litigation, seeking to have Act 34 declared unconstitutional under both the United States and Pennsylvania Constitutions and seeking to enjoin its use. (A copy of the petition is attached as an exhibit to this Memorandum).

ARGUMENT

SUPREME COURT PRECEDENT REQUIRES THIS COURT TO DEFER FURTHER CONSIDERATION OF THIS CASE IN FAVOR OF THE PENDING LITIGATION IN THE PENNSYLVANIA COMMONWEALTH COURT

The United States Supreme Court has made clear that a federal district court should stay its consideration of congressional redistricting when a state court is acting upon the issue. *Grove v. Emison*, 507 U.S. 25 (1993); *Scott v. Germano*, 381 U.S. 407 (1965). The Court has repeatedly emphasized that "reapportionment is primarily the duty and responsibility of the State through its legislative or other

body rather than of a federal court.” *Grove*, 507 U.S. at 34 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Consequently, the “Court has required federal judges to defer consideration of disputes involving redistricting where the State, either through its legislative *or* judicial branch, has begun to address that highly political task itself.” *Id.* at 33 (emphasis in original). Indeed, “in the reapportionment context, when parallel State proceedings exist, the [federal court’s] decision to refrain from hearing litigants’ claims should be *the routine course.*” *Rice v. Smith*, 988 F. Supp. 1437, 1439 (M.D. Ala. 1997) (emphasis added). Because the Commonwealth Court has begun to address the “highly political task” of redistricting, *Grove*, 507 U.S. at 33, this Court should follow “the routine course,” *Rice* 988 F. Supp at 1439, and defer further consideration of the present congressional redistricting dispute until the Commonwealth Court has acted.

In *Germano*, federal and state courts simultaneously considered a redistricting plan for the Illinois State Senate. In 1963, the federal court plaintiffs brought an action challenging the plan on the ground that the Senate districts were malapportioned, *Germano v. Kerner*, 220 F. Supp. 230 (N.D. Ill. 1963), and in April 1964, a different plaintiff brought a similar action in state court. *Germano*, 381 U.S. at 408. The federal district court entered a judgment declaring invalid the portions of the Illinois Constitution and Illinois Revised Statutes that apportioned voting districts for the State Senate, and ordered the State to submit to the federal court for approval any revised districting plan that the State might adopt. *Id.* Subsequent to the federal court’s order, the Illinois Supreme Court also held that

the districting plan for the Senate was invalid, but allowed the Illinois General Assembly to perform its duty to enact a constitutionally valid plan. *Id.* In light of the Illinois Supreme Court's decision, certain parties to the federal action asked the federal court to reconsider its order and stay further proceedings. *Id.* at 408-409. The district court, however, refused to do so. *Id.* at 409.

The United States Supreme Court reversed, holding that "the District Court should have stayed its hand." *Id.* at 409. The Supreme Court reasoned that "[t]he power of the judiciary of a state to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* The Supreme Court allowed the district court to retain jurisdiction and enter appropriate orders, but only "in the event a valid reapportionment plan for the State Senate is not timely adopted" *Id.*

Like *Germano*, *Grove* involved simultaneous consideration of congressional and legislative redistricting plans by state and federal courts. The state court concluded that the state legislative districting plan violated the Federal and State Constitutions, and issued a new redistricting plan. *Grove*, 507 U.S. at 29. Before that plan could be put into effect, however, the federal court issued its own plan, stayed the state court proceedings, and enjoined the state court from attempting to implement *any* state legislative or congressional redistricting plan. *Id.* at 30.

The Supreme Court reversed, holding that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's state legislative and federal congressional districts." *Id.* at 42. The Supreme Court reasoned that the

“doctrine of *Germano* prefers *both* [legislatures and state courts] to federal courts as agents of apportionment.” *Id.* at 34 (emphasis in original). Thus, in matters of reapportionment, federal courts are required to defer not only to the states’ legislative bodies but to the judicial ones as well. *See id.* at 34-35 (the Supreme Court has “encouraged state judicial supervision of redistricting,” and “the primacy of the State in designing those districts compels a federal court to defer”). Deferral becomes unnecessary *only* when neither the state legislature nor judiciary exercises its responsibility to develop a redistricting plan in time for the upcoming elections. *Id.* at 36; *Germano*, 381 U.S. at 409 (allowing the district court to act only if a valid reapportionment plan was not adopted in a timely fashion); *see also, Cano v. Davis*, 191 F. Supp. 2d 1140, 1145 (C.D. Cal. 2002) (refusing to defer to state court where it was clear that deferral would prevent voting rights violations from being remedied prior to the next statewide election).

The case presented here is legally indistinguishable from both *Germano* and *Grove*. Here, as in those cases, there is a federal court proceeding seeking a determination concerning the constitutionality of a redistricting plan. Here, as in those cases, there is a parallel action in the Commonwealth Court proceeding on similar grounds and seeking similar relief.¹ This is not an instance where the General Assembly and state courts have failed to exercise their responsibilities.

¹ It is not necessary that the complaint in the state action be identical to the complaint in this action for this Court to defer to the Commonwealth Court. It is only necessary that the nature of the relief requested be the same. *Grove*, 507 U.S. at 35. Here, both the federal plaintiffs and Senator Mellow seek declaratory and injunctive relief and the implementation of a legally valid plan.

This is an instance where the Commonwealth Court is considering the same issues as this Court, issues that the Supreme Court has said should be considered by federal courts only if the State is not acting upon them. *Grove*, 507 U.S. at 33.

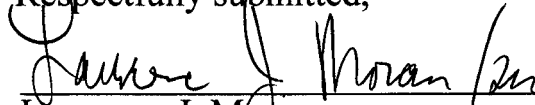
Nor is there any danger here that Pennsylvania will be left without congressional districts if this Court defers to the Commonwealth Court. Although the next statewide election will occur on November 5, 2002, the redistricting plan at issue in this action and in the State Court Litigation is not being used in that election. As the Court knows, the districts established by Act 1 will be used in the November 2002 election, and the districts established by Act 34 will not be used until 2004 (if then). In short, here, as in *Grove*, “[t]he record simply does not support a conclusion that the state court [of Pennsylvania] is unwilling or unable to adopt a congressional plan in time for elections.” *Id.* at 37. Therefore, this Court should defer its judgment.

CONCLUSION

For all the reasons set forth above, Senator Mellow respectfully requests that this Court grant his motion to stay this action pending resolution of the State Court Litigation.

Dated: October 9, 2002

Respectfully submitted,



Lawrence J. Moran
ABRAHAMSEN, MORAN &
CONABOY, P.C.
W.C. Carter Building
205-207 North Washington Ave.
Scranton, PA 18503
(570) 348-0200

Mark A. Packman
Aaron R. Lancaster
Filomena D'Elia
GILBERT HEINTZ & RANDOLPH LLP
1100 New York Avenue, NW
Suite 700
Washington, DC 20005-3987
(202) 772-2200

COUNSEL FOR
SENATOR ROBERT J. MELLOW

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
MIDDLE DISTRICT

**ROBERT J. MELLOW, Senator, 22nd
District,**

Petitioner,

vs.

Docket No. 725 MD 2002

**MARK S. SCHWEIKER, in his capacity as
Governor of the Commonwealth of
Pennsylvania, and ROBERT C.
JUBELIRER, in his capacity as Lieutenant
Governor of the Commonwealth of
Pennsylvania, C. MICHAEL WEAVER, in
his capacity as Secretary of the
Commonwealth of Pennsylvania, and
RICHARD FILLING, in his capacity as
Commissioner of the Bureau of
Commissions, Elections, and Legislation of
the Department of State,**

Respondents.

Oct 9 3 23 PM '02
RECEIVED AND FILED
COMMONWEALTH COURT
OF
PENNSYLVANIA

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Notice and Petition for Review are served, by entering a written appearance, personally or by an attorney, and by filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that, if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court, without further notice, for any money claimed in the Complaint or for any other claim for relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE EITHER OF THE OFFICES SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Central Pennsylvania Legal Services, Inc.
213 North Front Street
Harrisburg, PA 17101
(717) 232-0581

and

Public Services and Lawyers Referral
Committee,
Dauphin County Bar Association
213 North Front Street
Harrisburg, PA 17101
(717) 232-7536

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ROBERT J. MELLOW, Senator, 22nd
District,

Petitioner,

vs.

Docket No. 725 MD 2002

MARK S. SCHWEIKER, in his capacity as
Governor of the Commonwealth of
Pennsylvania, ROBERT C. JUBELIRER, in
his capacity as Lieutenant Governor of the
Commonwealth of Pennsylvania, C.
MICHAEL WEAVER, in his capacity as
Secretary of the Commonwealth of
Pennsylvania, and RICHARD FILLING, in
his capacity as Commissioner of the Bureau
of Commissions, Elections, and Legislation
of the Department of State,

Respondents.

RECEIVED AND FILED
COMMONWEALTH COURT
OF
PENNSYLVANIA
Oct 9 3 23 PM '02

PETITION FOR REVIEW IN THE NATURE OF A
DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

NOW COMES Petitioner Robert J. Mellow, by his attorneys, and states as follows for his
Petition for Review pursuant to chapter 15 of the Pa. R.A.P.:

NATURE OF THE ACTION

1. This case involves the drawing of new congressional districts for the Commonwealth
of Pennsylvania. As alleged below, Act 34 of 2002, the congressional redistricting plan passed
by the General Assembly, violates both the United States Constitution and the Pennsylvania
Constitution. In particular, the plan violates the "one person, one vote" principle in that the
deviation between the populations of the most and least populous districts in the plan totals 97
people, and the Respondents have no adequate justification for this deviation.

JURISDICTION

2. This Court has jurisdiction pursuant to 42 Pa.C.S.A. § 761 and 42 U.S.C. § 1983.

PARTIES

3. Petitioner is a citizen of the United States and of the Commonwealth of Pennsylvania and is a registered Democratic voter. Petitioner serves as the State Senator from the 22nd Senatorial District and is the Democratic Leader of the Senate of Pennsylvania. Petitioner brings this action in his individual capacity and in his official capacity on behalf of the Democratic Caucus of the Senate of Pennsylvania.

4. Respondents are the officials of the Commonwealth of Pennsylvania with responsibilities under the Constitution and laws of the Commonwealth for conducting elections. They are both named in their official capacities only.

5. Respondent Mark Schweiker serves as the Governor of the Commonwealth of Pennsylvania.

6. Respondent Robert C. Jubelirer serves as the Lieutenant Governor of the Commonwealth of Pennsylvania.

7. Respondent C. Michael Weaver serves as the Secretary of the Commonwealth of Pennsylvania and oversees Pennsylvania's electoral process and consequently has responsibility for administering elections for United States Congress.

8. Respondent Richard Filling serves as the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Department of State of the Commonwealth of Pennsylvania. He is responsible for administering functions relating to Pennsylvania's electoral process, including elections for United States Congress.

FACTUAL ALLEGATIONS

The Relevant Federal Constitutional Provisions

9. Article I, § 2, of the United States Constitution, as amended by § 2 of the Fourteenth Amendment, provides in relevant part that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States” and that “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State” As interpreted by the United States Supreme Court, this provision requires that, as nearly as is practicable, congressional districts have equal numbers of people (the “one person, one vote” principle). State action that seeks to enforce or implement a districting plan that does not satisfy the one person, one vote principle violates Article I, § 2, and 42 U.S.C. § 1983.

The General Assembly’s First Congressional Redistricting Plan

10. During the 1990s, Pennsylvania had 21 seats in the United States House of Representatives. Following the 2000 census, however, when congressional seats were reapportioned, Pennsylvania was allotted only 19 seats in the House of Representatives. As a result of this loss of two seats and shifts in population during the 1990s that rendered the congressional districts used during the 1990s substantially unequal in population, Pennsylvania had to draw new congressional districts.

11. According to the 2000 census, Pennsylvania has a population of 12,281,054. The “ideal” population of a congressional district (*i.e.*, the population that each congressional district would have if all the districts had equal numbers of people) is calculated by dividing the population of Pennsylvania (12,281,054) by the number of congressional districts (19). Thus, if

all 19 congressional districts are to have populations as nearly equal as possible, each congressional district should have 646,371 or 646,372 people.

12. During the Fall of 2001, members of the General Assembly offered various bills re-drawing Pennsylvania's congressional districts in an effort to reflect the loss of two congressional seats and the shifts in population that had occurred during the 1990s. These bills included Senate Bill 1200 ("SB 1200"), which was introduced by Republicans in the Pennsylvania Senate on November 16, 2001. During the debate in the Senate on SB 1200, a member of the Senate's Democratic Caucus offered an amendment (A4552) to the bill, which was defeated 27-22. On December 10, 2001, SB 1200 passed the Senate.

13. The Pennsylvania House of Representatives amended SB 1200, but the Senate "non-concurred" in the amendment. The leadership of the Senate and House then appointed a conference committee to reconcile the differences between the House and Senate versions of SB 1200. On January 3, 2002, the Conference Committee reported a version of SB 1200 that was approved by a majority of the conferees. On January 3, 2002, both the Senate and House passed SB 1200, as reported by the Conference Committee.

14. On January 7, 2002, Governor Schweiker signed SB 1200 into law as Act 1 of 2002 ("Act 1").

15. Act 1 had a maximum deviation (the difference between the most and least populous districts) of 19 people.

State Court Litigation Regarding Act 1

16. On January 10, 2002, JoAnn Erfer and Jeffrey Albert, two citizens registered to vote in Pennsylvania, filed a Petition for Review in the Commonwealth Court, raising federal and state law challenges to Act 1. The Petition named as respondents the Commonwealth, the

Governor, the Lieutenant Governor, the Speaker of the House, the Secretary of the Commonwealth, and the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Department of State. (Senator Mellow was not a party to this action.) The Petition alleged, *inter alia*, that Act 1 (a) violated the “one person, one vote” principle because of its 19-person deviation and (b) unconstitutionally gerrymandered districts to favor the Republicans.

17. On January 25, 2002, Erfer and Albert filed an emergency application in the Pennsylvania Supreme Court, asking that court to exercise plenary jurisdiction over their action and to set an expedited hearing schedule for the resolution of their state law claims. The Supreme Court granted the application and directed that the Commonwealth Court issue findings of fact and conclusions of law by February 8, 2002.

18. On February 8, 2002, the Commonwealth Court (Pellegrini, J.) issued findings of fact and conclusions of law. The Court concluded that Erfer and Albert’s state law claims should be dismissed. In particular, the Court concluded that neither the guarantee in Article I, § 5, of the Pennsylvania Constitution of “free and equal” elections nor the guarantee of equal protection of the laws found in Article I, §§ 1 and 26, was violated by the 19-person deviation in Act 1. The Court further concluded that Erfer and Albert’s allegations of partisan gerrymandering likewise failed to state a cause of action for violation of these state constitutional provisions.

19. The Pennsylvania Supreme Court reviewed the Commonwealth Court’s findings of fact and conclusions of law and agreed that the state law claims should be dismissed. The Supreme Court noted that Erfer and Albert had not pursued their “one person, one vote” claim in the Supreme Court, and the Supreme Court therefore did not consider it. Employing somewhat different reasoning than the Commonwealth Court, the Supreme Court held that Erfer and

Albert's evidence of partisan gerrymandering failed to establish a violation of the Pennsylvania Constitution. *Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325 (2002).

Federal Court Litigation Regarding Act 1

20. On December 21, 2001, Richard Vieth, Norma Jean Vieth, and Susan Furey (the "Vieth Plaintiffs") filed suit in the United States District Court for the Middle District of Pennsylvania, challenging the constitutionality of Act 1 on federal grounds. The complaint named as defendants the Commonwealth, the Governor, the Lieutenant Governor, the Speaker of the House, the Secretary of the Commonwealth, and the Commissioner of the Bureau of Commissions, Elections, and Legislation of the Department of State. (Senator Mellow was not a party to this action.) Among other things, the Vieth Plaintiffs alleged that the deviation in Act 1 violated the "one person, one vote" principle embodied in Article I, § 2, of the United States Constitution and that Act 1 was a partisan gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Vieth Plaintiffs sought declaratory relief and an injunction against the implementation of Act 1. A federal court of three judges (United States Circuit Judge Richard Nygaard, United States District Judge William H. Yohn, Jr., and Senior United States District Judge Sylvia Rambo) was appointed to hear the case pursuant to 28 U.S.C. § 2284.

21. The federal court dismissed the partisan gerrymandering claim, ruling that the Vieth Plaintiffs had failed to state a cause of action under the Fourteenth Amendment. *Vieth v. Commonwealth*, 188 F. Supp. 2d 532 (M.D. Pa. 2002).

22. On April 8, 2002, however, the federal court issued an order invalidating Act 1 and enjoining its implementation. *Vieth v. Commonwealth*, 195 F. Supp. 2d 672 (M.D. Pa. 2002). In an opinion accompanying the order, the federal court explained that Act 1 violated the "one-

person, one-vote” rule because the plan had a deviation of 19 people that was avoidable and the reason offered by defendants to justify the deviation – a purported desire to avoid splitting precincts – was a mere pretext.

23. The federal court did not, however, impose a new plan. Rather, the federal court ordered Defendants to submit, by April 29, for review and approval, a constitutionally sound redistricting plan.

The General Assembly’s Second Congressional Redistricting Plan

24. On April 9, Republicans in the State Senate introduced Senate Bill 1234, a congressional redistricting plan designed to remedy the deficiencies in Act 1. On April 15, Democrats in the State Senate proposed a competing redistricting plan as an amendment to Senate Bill 1234. The Senate’s Republican majority voted down the Democratic alternative. On April 17, the Senate passed House Bill 2545, a Republican-supported congressional redistricting plan that subsequently passed the House. On April 18, Governor Schweiker signed House Bill 2545 into law as Act 34 of 2002.

25. Act 34 has a deviation of 97 people. The reason is that, on March 15, 2002, between the passage of Act 1 and the passage of Act 34, the Armstrong County Court of Common Pleas issued an order that changed the border between two election districts (*i.e.*, precincts) in South Buffalo Township (which is located approximately 25 miles northeast of Pittsburgh). This change had the effect of moving 49 people from one precinct to the other. This change would not have affected the deviation of Act 34 except for the fact that Act 34 splits South Buffalo Township and places one of these precincts in Congressional District 3 and the other in Congressional District 12. Had the population of these precincts been what it was prior to the action of the Armstrong County Court of Common Pleas, Congressional District 3 in Act 34

would have had 646,372 people, a deviation of 1 person, and Congressional District 12 would have had 646,371, the ideal population. Because of the boundary change, however, the population of Congressional District 3 in Act 34 actually is 646,323 (48 fewer people than the ideal) and the population of Congressional District 12 is 646,420 (49 more people than the ideal). Thus, far from having a deviation of 1 person, Act 34 actually has a deviation of 97 people.

26. The Armstrong County Board of Elections, which had sought and obtained the March 15 order that changed the border between the two precincts in South Buffalo Township, subsequently petitioned the Armstrong County Court of Common Pleas to vacate its March 15 order and to restore the boundary line between the two election districts in South Buffalo Township to its prior location. On July 29, 2002, the Armstrong County court issued an order denying the petition to vacate the March 15 order. *In re: Realignment of the Division Eastern and Western Precincts of the South Buffalo Township Election District*, No. 2002-0081-MISC. (Arm. Co. Ct. Comm. Pleas July 29, 2002). The result of the Armstrong County court's July 29 order is that the election district boundary in South Buffalo Township has *not* been restored to its original configuration. Rather, the boundary remains where the court placed it on March 15, which in turn means that Act 34 has a deviation of 97 people. No party appealed from the Armstrong County court's July 29 order.

27. On September 13, following briefing on the status of the Armstrong County matter, the federal court set a hearing for October 15 on the constitutionality of Act 34. Meanwhile, on May 6, 2002, Senator Mellow moved, on behalf of the Democrats in the Pennsylvania Senate, for leave to intervene in the remedial phase of the federal case or, in the alternative, to participate as *amicus curiae*. On September 13, the federal court granted his motion to participate as *amicus curiae*, but denied his motion to intervene.

COUNT I

(Violation of Article I, § 2, of the United States Constitution)

28. Petitioner re-alleges Paragraphs 1-27 of this Petition for Review and incorporates them here by reference as if fully set forth in this count.

29. Because Act 34 has a deviation of 97 people, it violates the “one person, one vote” principle embodied in Article I, § 2, of the United States Constitution. This deviation does not result from a good-faith effort to achieve districts of equal population, and there is no justification for the deviation. Any action by the Respondents to enforce or implement Act 34 will deprive Petitioner of rights guaranteed him by the United States Constitution and cause Petitioner irreparable harm.

COUNT II

(Violation of the Pennsylvania Constitution)

30. Petitioner re-alleges Paragraphs 1-29 of this Petition for Review and incorporates them here by reference as if fully set forth in this count.

31. Article I, § 1, of the Pennsylvania Constitution provides that “All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”

32. Article I, § 5, of the Pennsylvania Constitution provides that “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

33. Article I, § 26, of the Pennsylvania Constitution provides that “Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.”

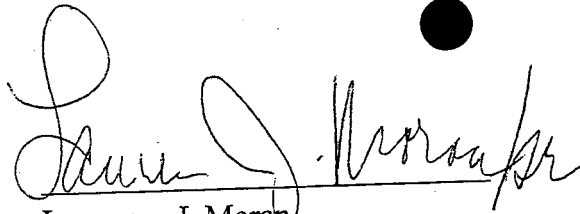
34. Taken together, these provisions of the Pennsylvania Constitution also require compliance with the “one person, one vote” principle.

35. Because Act 34 has a deviation of 97 people, it violates the “one person, one vote” principle embodied in the above-quoted provisions of the Pennsylvania Constitution. This deviation does not result from a good-faith effort to achieve districts of equal population, and there is no justification for the deviation. Any action by the Respondents to enforce or implement Act 34 will deprive Petitioner of rights guaranteed him by the Pennsylvania Constitution and cause Petitioner irreparable harm.

WHEREFORE, Petitioner prays for the following relief:

1. a declaration that Act 34 violates Article I, § 2, of the United States Constitution and the Pennsylvania Constitution;
2. an injunction against the use by Respondents, their officers, agents, employees, attorneys, successors in office, and any and all persons acting in concert with Respondents of Act 34 (or any other congressional districting plan that violates federal or state law) in any primary, general, or special election for members of Congress;
3. if necessary, an injunction ordering into effect a new, constitutional congressional redistricting plan for Pennsylvania;
4. costs and attorneys’ fees; and
5. such other relief as the Court deems just and proper.

Dated: October 9, 2002



Lawrence J. Moran
ABRAHAMSEN, MORAN & CONABOY, P.C.
W.C. Carter Building
205-207 North Washington Ave.
Scranton, PA 18503
(570) 348-0200 (telephone)
(570) 348-0273 (facsimile)

Mark A. Packman
GILBERT HEINTZ & RANDOLPH LLP
1100 New York Avenue, NW, Suite 700
Washington, DC 20005-3987
(202) 772-2320 (telephone)
(202) 772-2322 (facsimile)

COUNSEL FOR
SENATOR ROBERT J. MELLOW

IN THE COMMONWEALTH COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ROBERT J. MELLOW, Senator, 22nd
District,

Petitioner,

vs.

MARK S. SCHWEIKER, in his capacity as
Governor of the Commonwealth of
Pennsylvania, and ROBERT C.
JUBELIRER, in his capacity as Lieutenant
Governor of the Commonwealth of
Pennsylvania, C. MICHAEL WEAVER, in
his capacity as Secretary of the
Commonwealth of Pennsylvania, and
RICHARD FILLING, in his capacity as
Commissioner of the Bureau of
Commissions, Elections, and Legislation of
the Department of State,

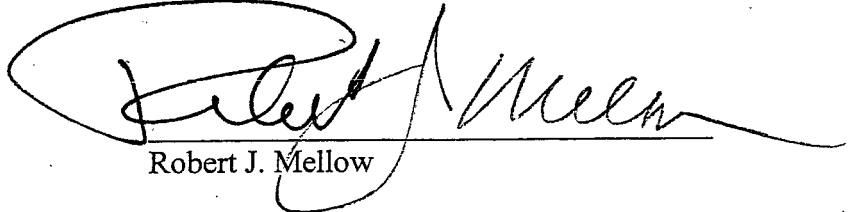
Respondents.

Docket No. 7257D

RECEIVED AND FILED
COMMONWEALTH COURT
OF PENNSYLVANIA
OCT 9 2002
3 23 PM '02

VERIFICATION

Senator Robert J. Mellow hereby states, subject to the penalties of 18 Pa. C.S. § 4904,
that he is authorized to make this verification, that he has read the foregoing Petition for Review
in the Nature of a Declaratory Judgment and Permanent Injunction and that the facts set forth
therein are true and correct to the best of his knowledge, information, and belief.


Robert J. Mellow

Dated: October 9, 2002