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

RICHARD VIETH, et al,	:	
	Plaintiffs,	:
	:	:
	v.	No. 1:CV-01-2439
	:	(Judge Rambo)
	:	:
THE COMMONWEALTH OF	:	
PENNSYLVANIA, et al.,	:	
	Defendants. :	

**MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY
JUDGMENT FILED BY DEFENDANTS LIEUTENANT GOVERNOR
JUBELIRER AND SPEAKER RYAN ("PRESIDING OFFICERS")**

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PROCEDURAL HISTORY

Following the 2000 Census, Pennsylvania enacted a law, Act 2002-1 ("Act 1") containing a plan for congressional districts. Dft. Ex. 53 (Mar. 11-12, 2002 hearing) (Tab C).¹ On January 11, 2002, an amended complaint challenged the plan as, *inter alia*, violating the one-person, one-vote principle. *See* Docket Entry #6. On April 8, 2002, this Court declared the plan unconstitutional and enjoined its use.² *See Vieth v. Commonwealth*, 195 F.Supp.2d 672 (M.D. Pa. 2002), *appeals dismissed as moot*, 71 U.S.L.W. 3233 (October 7, 2002).

On April 17, 2002, Pennsylvania enacted Act No. 2002-34 ("Act 34"), which included a revised congressional districting plan, designed to correct the defect this Court found in the Act 1 plan. *See* HB 2545 History (Tab G); HB 2545, PN 3726 (Tab H); LEGISLATIVE JOURNAL – SENATE (Apr. 17, 2002) at 1653 (Tab I). On April 22, 2002, Plaintiffs asked this Court to take remedial action, arguing that the Act 34 plan violates the one-person, one-vote principle because an alleged deviation of 97 people exists between the largest and smallest districts. *See* Docket Entry #150. Plaintiffs base the challenge on an alleged change to the boundary between two election districts of South Buffalo Township, Armstrong County approved March 15, 2002 by that county's court of common pleas. *Id.*

STATEMENT OF FACTS

A. Background

The 2000 Census showed that Pennsylvania had a population of 12,281,054 and that there had been significant shifts of population. *See* Dft. Ex. 80 (Mar. 11-12, 2002 hearing) (Tab A). Pennsylvania also lost two seats in Congress, going

¹ Tab references are to the Appendix to Statement of Material Facts.

² On April 23, 2002, this Court stayed its injunction of the Act 1 plan with respect to its use in the 2002 congressional elections. *See* Docket Entry #155.

from 21 to 19. Dft. Ex. 79 (Mar. 11-12, 2002 hearing) (Tab B). Act 34 will be used for any post-2002 primary, general or special election for Congress.

B. Population Data

Both the Act 1 and the Act 34 plans were based on 2000 Census data, as assigned by the Legislative Data Processing Center ("LDP")³ to Pennsylvania's more than 9000 election districts (a/k/a precincts) and certified as usable by the Legislative Reapportionment Commission⁴ ("LDP data"). *See* Affidavit of Kathy A. Sullivan (Tab J). LDP data are used for both legislative and congressional redistricting. *See id.* The Democrat and Republican Caucuses of both houses of Pennsylvania's General Assembly use LDP data for congressional redistricting. *See id.* & Mar. 11, 2002 Hearing Trans. I: 12-13, 36, 60-61, 78 (Priest).

To stabilize the configuration of precincts for the legislative and congressional redistricting processes, the General Assembly in 1999 enacted a freeze on election district alterations. *See* Act No. 1999-51 (Tab M). On February 11, 2000, Defendant Filling, the Commissioner of the Bureau of Commissions, Elections and Legislation, issued an interpretation of Act No. 1999-51 stating, in pertinent part, that the statute "provides that election districts may not be altered during the period from June 1, 2000 through April 30, 2002." (Tab M). Act 1999-51's amendment of the Pa. Election Code is found at 25 P.S. §2745-2750.

When requested by a caucus, LDP provides a legal description and a per-district population for a plan to be considered by the General Assembly. *See* Affidavit of Sullivan (Tab J). During the General Assembly's consideration of a revised congressional districting plan that would correct the violation found by this

³ LDP is a bipartisan, bicameral legislative service agency.

⁴ Pennsylvania's Legislative Reapportionment Commission consists of the majority and minority leaders of both houses of its General Assembly and a chair elected by them or appointed by its Supreme Court. *See* PA. CONST. art. II, §17.

Court on April 8, 2002, LDP, using the same LDP data as for the Act 1 plan, prepared a legal description and a per-district population for each Caucus. *See id.*

Under Act 34, the boundary between the two election districts in South Buffalo Township, Armstrong County, forms a portion of the boundary between the 3rd and 12th Congressional Districts, just as it did under the Act 1 plan. *Compare* 25 P.S. §3595.1(3) & (12) (Act 1) *with* 25 P.S. §3595.301(3) & (12) (Act 34); Affidavit of Sullivan (Tab J). When Senate Majority Leader Brightbill offered what is now the Act 34 plan as an amendment to HB 2545, he described it as a "zero" deviation plan, given that the LDP had determined the plan had 5 districts with 646,372 people and 14 with 646,371 people. *See* LEGISLATIVE JOURNAL – SENATE (April 17, 2002) at 1653 (Tab I); Affidavit of Sullivan (Tab J). No member of the General Assembly, during its consideration, challenged the Act 34 plan as deviating from the one-person, one-vote principle. *See Id.* at 1647-54; LEGISLATIVE JOURNAL – HOUSE (April 17, 2002) at 706-11 (Tab K).

C. Armstrong County

On February 19, 2002, the Armstrong County Board of Elections ("Board") petitioned the Armstrong County Court for approval of a change to the boundary between the two elections districts of South Buffalo Township. *See* Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. ("Armstrong Co. Ct. Dkt.") (Tab L(1)). Defendants here were not parties to that petition. *See id.* The Board sought to change the boundary between the election districts of South Buffalo Township in order that the Northpointe Industrial Park would be located entirely within the 12th Congressional District, rather than split between the 3rd and 12th Congressional Districts, although this is not mentioned in the Board's petition. *See id.*; Affidavit of R. Priest appended to document filed at Docket Entry #150; Certified Copies of Third-Party Petition ¶¶29, 31 & Answer thereto (filed in *Mellow v. Schweiker*, Pa. Cmwlth Ct. No. 725 M.D. 2002) ("Third-

Party Petition & Answer thereto") (Tab N). Northpointe, which opened on Oct. 18, 2001, is an economic development project expected to create 3,500 new jobs. See www.house.gov/murtha/bio/bio02.htm, (Biography of Congressman Murtha) (Tab O); Third-Party Petition & Answer thereto at ¶28 (Tab N). Mr. Murtha, the senior member of Pennsylvania's congressional delegation and the representative from the 12th District, was instrumental in obtaining federal grants for Northpointe's development. See Biography of Congressman Murtha (Tab O); Third-Party Petition ¶30 & Answer thereto (Tab N). On March 15, 2002, the county court approved the unopposed change. See Armstrong Co. Ct. Dkt. (Tab L(4)). The court's order did not note any impact on congressional districts. *Id.*

When the Board was reminded that the Election Code, 25 P.S. §2746, prohibited this change, the Board, on May 8, 2002, petitioned the Armstrong County Court to vacate its March 15, 2002 order.⁵ See Armstrong Co. Ct. Dkt. (Tab L(5)). Moreover, the Board held the May 21, 2002 primary election and the November 5, 2002 general election for Congress in accordance with the pre-March 15, 2002 boundary between the two election districts of South Buffalo Township. See Third-Party Petition ¶39 & Answer thereto (Tab N).

D. Boundaries of the Act 34 Plan

On December 9, 2002, SB 824 became law as Act No. 2002-150 ("Act 150"), amending the Pennsylvania Election Code to add a new Section 506:

In administering elections for the nomination and election of candidates for the United States House of Representatives and the General Assembly, county boards of election shall adhere to the following rule: Where an election district is used in or pursuant to a congressional redistricting statute or the final plan of the Legislative Reapportionment Commission to define the boundary of a congressional district or state legislative district, the boundary of such election district shall be the boundary existing and recognized by the

⁵ On July 29, 2002, the county court denied the unopposed petition of the Board. See Armstrong Co. Ct. Dkt. (Tab L(10)).

Legislative Reapportionment Commission for the adoption of its final plan. The boundaries of the Congressional districts, as established by statute, and state legislative districts as set forth in the final plan of the Legislative Reapportionment Commission shall remain in full force and effect for use thereafter until the next reapportionment or redistricting as required by law and shall not be deemed to be affected by any action taken pursuant to this article.

Under Section 506, any election under the Act 34 plan will use the pre-March 15 boundary of election districts in South Buffalo Township, i.e., the same boundary used to conduct the May 21st and November 5th congressional elections. *See* SB 824, PN 2435 §6.2 (Tab T).

STATEMENT OF QUESTIONS INVOLVED

1. Does the Act 34 plan satisfy the one-person, one-vote principle, either *ab initio* or as a result of subsequent legislation?
2. Does U.S. CONST. art. I, §4 preclude the March 15, 2002 order from impacting the boundary between the 3rd and 12th Congressional districts?

Suggested answer to both questions: YES.

ARGUMENT

I. STANDARD

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 854 (3d Cir. 2000) (quoting Fed. R. Civ. P. 56(c)). Act 34 is a statute entitled to a presumption of constitutionality. *See e.g., Heller v. Doe*, 509 U.S. 312 (1993).

II. SECTION 506 OF THE PA. ELECTION CODE REQUIRES ACT 34 TO BE ADMINISTERED IN COMPLIANCE WITH THE ONE-PERSON, ONE-VOTE PRINCIPLE

Plaintiffs' argument that the Act 34 plan has a variance of 97 people between the largest and smallest congressional districts is based on an alleged change to the

boundary between the election districts in South Buffalo Township. It is their position that, to the extent the Act 34 plan uses election district boundaries to define the boundaries of Congressional districts, the election district boundaries must be those in existence on the date that Act 34 was enacted, i.e., April 17, 2002. *See* Docket Entry #150. Plaintiffs do not dispute that, if the pre-March 15 boundary is used, the population deviation between the largest and smallest Congressional district under the Act 34 plan would be 1, which is a "zero" deviation plan.

Plaintiffs' argument has always lacked merit. However, as of December 9, 2002, the effective date of Act 150, Plaintiffs' argument does not even require serious consideration. Section 6.2 of Act 150 adds new Section 506 to the Pa. Election Code. Section 506 mandates that the boundaries of election districts, when they in turn define a congressional or state legislative district boundary, "shall be the boundary existing and recognized by the Legislative Reapportionment Commission for the adoption of its final plan." In Armstrong County, this means that the Board must administer congressional elections in South Buffalo Township as it did for the primary and general congressional elections in 2002 under Act 1, i.e., using the pre-March 15 precinct boundary. The 49 people whom Plaintiffs allege were moved from the 3rd to the 12th Congressional District will reside in the 3rd District for the congressional elections with which this Court is concerned.

III. ACT 34 HAS COMPLIED WITH THE ONE-PERSON, ONE-VOTE PRINCIPLE SINCE ITS ENACTMENT

A. No Population Deviation Exists

LDP data are the basic building blocks for legislative and congressional redistricting in Pennsylvania. These data have been used by the Legislative Reapportionment Commission in state legislative redistricting and by the General Assembly and the Pennsylvania courts in congressional redistricting since at least

1980. *See e.g., Mellow v. Mitchell*, 530 Pa. 44, 72-73, 607 A.2d 204, 218-19 (1992), *cert. denied*, 506 U.S. 828 (1992), and K. Gormley, *THE PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT OF 1991* (1994) at 23. Each of the four caucuses of the General Assembly used these data for drawing redistricting plans, as, during the hearing on Act 1, Plaintiffs' cartographer, Robert L. Priest, acknowledged. *See* Mar. 11, 2002 Hearing Trans. I: 12-13, 36, 60-61, 78 (testimony of Mr. Priest that the precinct population data used for drawing congressional redistricting plans were those assigned by LDP and adopted by the Legislative Reapportionment Commission). Mr. Priest is the Technical Director for the Pennsylvania House of Representatives, Democrat Caucus, Office of Demographic Analysis, which is "the redistricting office for the House Democratic Caucus." *Id.* at 10-11.

Based on the LDP data, the Act 34 plan contains no population deviation. When HB 2545 (which became Act 34) was considered by the Senate and the House, it was described as a zero deviation plan and no member challenged that representation. *See* LEGISLATIVE JOURNAL – HOUSE (April 15 & 17, 2002) at 639-62 & 706-11, respectively (Tabs P&K); LEGISLATIVE JOURNAL – SENATE (April 17, 2002) at 1647-54 (Tab I).

Even if the county court could have altered the population, it would be inconsequential. Just as with population migrations that may have occurred between the 2000 census and the enactment of Pennsylvania's congressional redistricting plan in 2002, the March 15 alteration attempted in Armstrong County is immaterial. *See Karcher v. Daggett*, 462 U.S. 725, 738 (9183) ("the census data provide the only reliable – albeit less than perfect – indication of the districts' 'real' relative population levels;" "because the census count represents the 'best population data available,' it is the only basis for good-faith attempts to achieve population equality") (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969)).

See also, Cromartie v. Hunt, 133 F.Supp.2d 407, 413 n.3 (E.D. N.C. 2000) (examining 1997 plan based on 1990 census data).

B. Unconstitutional Alteration of Congressional District Boundaries

No court has the power to change a congressional district's boundaries outside of a constitutional challenge and, even then, a court's power is extremely circumscribed. The U.S. Constitution gives authority to state legislatures to establish the time, place and manner for electing members of Congress. U.S. CONST. art. I, §4, cl.1 ("[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"). The legislature has the power and duty to re-divide a state into congressional districts in accordance with the most recent decennial census and the resulting apportionment of congressional seats. The division of a state into congressional districts is inherently a political process to be done by the state legislature. *See White v. Weiser*, 412 U.S. 783, 794, 795-96 (1973) ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination;' ... Districting 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)).

If Plaintiffs are correct, the order of the Armstrong County Court resulted in 49 individuals moving from the 3rd District to the 12th District at a time when the Act 1 plan was in effect, thereby increasing the population deviation between the highest and lowest districts to 103. Yet neither plaintiffs, nor their cartographer, nor defendants nor this Court itself were aware of the change and proceeded in the belief that there was a deviation of 19. Similarly, under plaintiffs' theory, this Court, if it devised a remedial plan, might later find that its work was flawed, because of actions unknown to it at the time in some local jurisdiction. Whatever impact the county court's order may have had on local elections, it cannot be

General Assembly's intent was to enact a congressional redistricting plan with a zero deviation. *See e.g.* LEGISLATIVE JOURNAL –HOUSE (April 15, 2002) at 648 (Tab P).⁷ To achieve this, the General Assembly used the LDP's population data.

Plaintiffs' theory of interpreting Act 34 violates one of the oldest, basic principles of statutory construction, by ignoring everything that happened in the General Assembly in the development and enactment of Act 34 and misdirecting attention to a county court's action granting a petition that did not even mention the issue of congressional district boundaries. "If literal interpretation of any part of [a statute] would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected." *Heyenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634, 639-40 (1877) (statute granting land to Nevada construed in a manner "seemingly contrary to the letter of the statute," in part, because "no other construction is consistent with the statute as a whole, and answers the evident intention of its makers ..."); *see also Wainwright v. McCullough*, 63 Pa. 66, 73 (1869) ("In order to arrive at the legal effect of the [low and high water] lines established by the commissioners under [the Act of April 16, 1858, P.L. 326], we must ascertain [the act's] true purpose."); *Dougherty v. Town Council of South Kingstown*, 61 R.I. 248, 254, 261, 200 A. 964, 967, 920 (1938) (to determine location of zoning district boundary denoted as "bounded ... on the East by Potter's Ponds," court looked to town's purpose for creating the zone).

⁷ House Majority Leader Perzel explained the revised plan to the members: [I]t was brought to our attention that the deviation in the map that ... we passed back in Act 1 of 2002 had a deviation that was much larger than the courts wanted us to have, so we went to work This amendment before us, all the districts in the Commonwealth of Pennsylvania, there are 14 districts with 646,371 people, a deviation of zero, and there are 5 districts with a population of 646,372, or a deviation of 1 person.

IV. THE *KARCHER* TEST

Should this Court agree with Plaintiffs that, due to the county court order, the Act 34 plan has a 97-person population deviation, then the Court must apply the two-prong test in *Karcher* to assess whether the deviation violates the principle of one-person, one-vote:

'The 'nearly as practicable' standard [for achieving population equality in congressional districts] 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.'

462 U.S. at 730 (quoting *Kirkpatrick*, 394 U.S. at 530-31). Plaintiffs must bear the burden of showing that the General Assembly did not make a good faith effort, and, if they are successful, the burden then shifts to Defendants to show a legitimate justification for the deviation. *Karcher*, 462 U.S. at 730-31.⁸

A. Good Faith Effort

Plaintiffs cannot show a lack of a good-faith effort by the General Assembly to draw congressional districts of equal population. The legislative journals and the use of the LDP data show that the General Assembly drew a new plan, with what it reasonably thought was a zero deviation, for the purpose of remedying the one-person, one-vote violation found by this Court. Moreover, there was a statutory prohibition on boundary alterations in place at the time Act 34 was being considered and passed. *See* 25 P.S. §2746. Furthermore, the Board did not report

⁸ This Court is bound by *Karcher* and related decisions of the U.S. Supreme Court. However, Presiding Officers respectfully raise the issue, in order to preserve it for appeal, that the majority in *Wesberry v. Sanders*, 376 U.S. 1 (1964) erred in relying on Article I of the Constitution for the one-person, one-vote principle, instead of relying on the 14th Amendment. The error of the rationale in *Wesberry* is provable, not just textually but mathematically as well, given the huge population deviation between congressional districts nationally (the largest being 182% the size of the smallest, according to population statistics) and the impossibility of eliminating it. The 14th Amendment provides a sounder basis for the principle and a standard that, while more deferential to the states, is still meaningful, as compared to *Karcher*.

its purported alteration, as required by law, to either the Secretary or LDP. *See* 25 P.S. §2747(b). The Board's proceeding was purely a local matter. The General Assembly was not involved; the Secretary was not involved. The petition did not even inform the county court that the precinct boundary formed part of the boundary between congressional districts. *See* Armstrong Co. Ct. Dkt. (Tab L(1)).

B. Justification

Should the Court conclude that Act 34 was not the product of a good-faith effort by the General Assembly to achieve population equality, the burden shifts to Defendants "to prove that the population deviations in [the] plan were necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740. If the Board is to be treated as an ersatz General Assembly, then its objective must be examined. Plaintiffs themselves have stated the objective: the change was made to place the entirety of a new industrial park in one congressional district—that of Congressman John Murtha, who is Pennsylvania's most senior representative and a very senior member of the Appropriations Committee of the U.S. House of Representatives. *See* Plaintiffs' Remedial Motion at 7 and Priest affidavit appended thereto (Docket Entry #150). Congressman Murtha, in his biography on his official website, describes Northpointe as "a premier industrial park developed with \$4.4 million for water and infrastructure in Armstrong County" and an economic development activity to which he has been "key." *See* Biography of Congressman Murtha (Tab O).

While the alleged total deviation of 97 is greater than the 19 of the Act 1 plan, it is still miniscule—0.015%. As this Court said in *Vieth v. Pennsylvania*, 195 F.Supp.2d 672, 677 (M.D. Pa. 2002), "the burden borne by the State varies inversely with the magnitude of the population deviation." *See also Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Law*, 781 F. Supp. 394, 397 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992). As was the case in

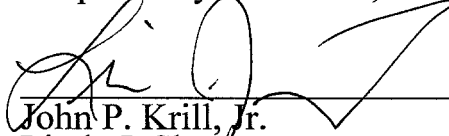
part in *Anne Arundel*, the boundary change here would appear to have been intended to accommodate a high-ranking, important congressman (Mr. Hoyer in *Anne Arundel*, Mr. Murtha here). The General Assembly, when enacting both the Act 1 plan and the Act 34 plan, was careful to accommodate Congressman Murtha. *See e.g.* LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1194, 1195, 1197 (Sen. Mellow), 1199, 1204 (Sen. Brightbill), 1199 (Sen. O'Pake), 1202-03 (Sen. Wagner), 1206 (Sen. Kasunic) (Dft. Ex. 2 (Tab D)); LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 5, 14 (Rep. DeWeese), 10 (Rep. Rooney) (Dft. Ex. 3 (Tab E)). In his testimony concerning the Act 1 plan, Congressman Mascara testified that the General Assembly had been responsive to Congressman Murtha's requests concerning his district. *See* Hearing Tr. III: 267 (Mascara). Representative Perzel informed the members of the House that the compromise reached by the Conference Committee satisfied Congressman Murtha. LEGISLATIVE JOURNAL – HOUSE (Jan. 3, 2002) at 15 (Perzel) (Dft. Ex. 4 (Tab F)). Accommodating Congressman Murtha provides a reasonable justification for the purported deviations in Districts 3 and 12.

CONCLUSION

For the foregoing reasons, the Court should enter judgment in favor of Defendants.

December 20, 2002

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on December 20, 2002, I caused a copy of the foregoing Memorandum in Support of Summary Judgment to be served as indicated:

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