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

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY, Plaintiffs, v. THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, et al Defendants.	No. 1: CV 01-2439 Judge Rambo, Judge Yohn, Judge Nygaard

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DIVIDE MARCH 11-12 HEARING

INTRODUCTION

Plaintiffs respectfully submit this Memorandum in support of their Motion to Divide March 11-12 Hearing. That motion seeks to clarify in advance the procedures that will apply at the trial to be held on March 11-12 concerning Plaintiffs' claim that the Pennsylvania congressional district map violates the constitutional one-person, one-vote principle.

Plaintiffs submit that the trial should be divided into two phases: a first phase in which Plaintiffs bear the burden of proving that a map with smaller population deviations could have been drawn and a second phase in which Defendants bear the burden of proving that the larger deviations in the map are justified as necessary to adhere to some specific, legitimate, and consistently applied districting criterion. This hearing

structure follows from *Karcher v. Daggett*, 462 U.S. 725 (1983), which this Court recognized in its February 22, 2002 opinion governs Plaintiffs' one-person, one-vote claim. *See Vieth v. Commonwealth*, No. 1:CV-01-2439, at 16-18 (M.D. Pa. Feb. 22, 2002).

A claim under *Karcher*, by its very nature, must be analyzed in two steps with a parallel shifting of the burden of proof. First, the Court asks whether Plaintiffs have shown that the population deviations in the present map could have been reduced or avoided. If so, the Court then asks whether the Defendants have shown that the deviations are justified. *See Karcher*, 462 U.S. at 740.

The most efficient trial structure is thus one that recognizes and follows these shifting burdens and has the parties present evidence accordingly. Accordingly, Plaintiffs respectfully urge the Court to hold a hearing in which Plaintiffs first present evidence that a map with smaller population deviations would have been possible, subject to any rebuttal evidence by the Defendants. Assuming Plaintiffs' burden is met, the Court would entertain Defendants' evidence attempting to justify those deviations from equality. Finally, Plaintiffs would be allowed to present evidence rebutting Defendants' justifications. This hearing structure accurately and efficiently recognizes *Karcher*'s allocation of burdens. Each burdened party will present evidence to carry its burden, and the non-burdened party will have an opportunity to rebut that showing.

ARGUMENT

THE COURT SHOULD ADOPT A STRUCTURE FOR THE PRESENTATION OF EVIDENCE AT HEARING BASED ON THE TWO STAGE INQUIRY ESTABLISHED IN *KARCHER*

In *Karcher*, the Supreme Court identified the two steps that comprise the one-person, one-vote inquiry.

> First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Id. at 730-31. Accordingly, "once a plaintiff comes forward with credible evidence that the overall deviations in the plan proffered by the state could be reduced, the burden shifts to the state to justify the deviations in its plan by reference to legitimate state interests furthered by the deviation." *Nerch v. Mitchell*, No. 3:CV-92-0095, at 27 (M.D. Pa. 1992) (attached). *See also Anne Arundel County Republican Central Committee v. State Administrative Board of Election Laws*, 781 F. Supp 394, 395 (D. Md. 1991) (three-judge court) (recognizing that, in "two-part test," burden shifts upon showing that population differences could have been reduced by good-faith effort); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022,

1033 (D. Md. 1994) (noting, in legislative context, that burden shifts from plaintiff to defendant upon showing that deviation exceeds permissible standard for legislative districts).

Plaintiffs propose a hearing structure that reflects the shifting burdens, in order to ensure that each side has the opportunity to rebut the other's attempt to carry its burden. Just as it would be inefficient if not impossible for Defendants to rebut the Plaintiffs' evidence regarding population deviation before the Plaintiffs have presented that evidence, it would be equally inefficient if not impossible for Plaintiffs to rebut the Defendants' justifications for Act 1 before the Defendants have offered those justifications.

Other courts have recognized this as an appropriate way to handle *Karcher* claims. In litigation that challenged the New York City Board of Estimate's election districts, for example, the presentation of evidence was divided into two distinct phases that corresponded to *Karcher*'s allocation of burdens, and gave each side the opportunity to respond to the other's attempt to carry its burden. *See Morris v. Board of Estimate*, 592 F. Supp. 1462, 1464 (E.D.N.Y. 1984).

Once the court in *Morris* found that the plaintiffs there had demonstrated a deviation that was not the result of a good faith effort at equality, it ordered the defendants to identify the justifications that it claimed supported the deviations. *See id.* at 1477. The defendants then presented evidence regarding the objectives that the challenged plan served

and the plaintiffs were given an opportunity to "present[] alternative plans that appear to respond to the accepted objectives and decidedly decrease the variance" in population. *Morris v. Board of Estimate*, 647 F. Supp. 1463, 1479 (E.D.N.Y. 1986). Because the plaintiffs successfully showed that the purported objectives could be achieved while still lowering population deviation, the court struck down the challenged plan. *Id.* Although the court in *Morris* held its hearings over a more extended period of time, its bifurcated structure offers a model for efficient adjudication of this case. *See also Nerch*, No. 3:CV-92-0095, at 34 (noting plaintiffs' opportunity to "attack the defendants' justification evidence"); Reply of Presiding Officers to Plaintiffs' Opposition to Motion *in Limine* at 2 (noting that under proper "sequence of proof," the "justification phase of this vote dilution case will arrive, if ever, only after Plaintiffs carry their initial burden to show that the General Assembly failed to make a good-faith effort to avoid population deviations in enacting Act 1").

Should the Court adopt the structure that Plaintiffs propose here, Plaintiffs will begin by demonstrating that Act 1 contains population deviations that are not the product of "a good-faith effort to achieve precise mathematical equality." *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). Among other evidence, Plaintiffs are prepared to introduce an alternative map or maps that demonstrate that plans with lower population deviations than Act 1 were indeed possible. "Courts have widely concluded

that this type of evidence is sufficient to shift the burden to the defendants to justify the deviations." *Nerch*, No. 3:CV-92-0095, at 31 (citing cases).

The Presiding Officer Defendants have tried to push a different standard under which the demonstrative map proffered by the Plaintiffs at phase one of the trial would have to both (1) show reduced population deviations *and* (2) be otherwise "substantially identical in geography" to Act 1. Reply Brief of Presiding Officers to Plaintiffs' Opposition to Motion *in Limine* at 2 n.1. They suggest that this is necessary because Plaintiffs, in the first phase, must show that the General Assembly could have reduced deviations while still adhering to all of its other "legislative goals." *Id.* But the very case that Defendants cite makes clear that such an argument is entirely unfounded: it confuses the initial phase with the later phase, in which the *Defendants* can attempt to justify deviations based on other "legislative goals." *See Stone v. Hechler*, 782 F. Supp. 1116, 1125 (N.D. W.Va. 1992) ("*Karcher* teaches that *if any plan* (other than the one under judicial attack) would reduce or eliminate population differences among the congressional districts, the plaintiff has met its burden under the first prong of *Karcher*.") (emphasis added); *id.* (rejecting attempt to merge *Karcher*'s two phases); *id.* at 1125-26 (noting that once plaintiffs establish "a plan with a smaller variation exists," then "the State has the burden of showing that each population variance was necessary to achieve some legitimate goal").

Assuming the Court finds Plaintiffs' deviation evidence persuasive, the burden will shift to the Defendants. Any policies that

Defendants suggest justify the population deviations will face a high burden. The Supreme Court has made clear that "the State must justify each variance, no matter how small," *Kirkpatrick*, 394 U.S. at 531, by showing "with some specificity that a particular objective required the specific deviations in its plan, rather than relying on general assertions." *Karcher*, 462 U.S. at 740-41. The policies that allegedly support the deviations must be "consistently applied" and "nondiscriminatory." *Id.* at 740. *See also Nerch*, No. 3:CV-92-0095, at 33 (requiring that, once defendants had identified a specific policy to justify the deviations, they still must demonstrate that "this policy was consistently applied and adequately justifies the deviations"); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1033 (D. Md. 1994) (noting that, for population deviations in congressional plans, "the State must demonstrate that the deviation is *required* in order to advance a rational state policy") (emphasis in original).

Although Plaintiffs are not yet aware of the justifications Defendants may attempt to offer,[1] Plaintiffs do not believe that any justification can explain the deviations in Act 1. The state policies that the Supreme Court has sanctioned as justifying population deviations include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent

[1] Plaintiffs are separately seeking precisely that information from Defendants.

Representatives." *Karcher*, 462 U.S. at 740. In other words, they are neutral policies that facilitate effective representation.

No such policy can justify Act 1's population deviations. The deviations cannot be to create compact districts, for Plaintiffs are prepared to introduce alternative plans and compactness evaluations that score much better in compactness measurements. The deviations cannot be to respect municipal boundaries, for Plaintiffs are prepared to introduce alternative plans that split far fewer municipal boundaries. The deviations cannot be to preserve district cores, for Plaintiffs' alternative plans preserve district cores far better than Act 1. And they cannot be to avoid contests between incumbents, for Act 1 provides a near slaughter of Democratic incumbents.

The alternative plans that Plaintiffs are prepared to introduce not only better achieve each of these interests, they do so while lowering population deviations. In other words, none of the permissible justifications necessitated the deviations in Act 1. To the contrary, adherence to those legitimate objectives could have been *better* achieved – and with *lower* population deviation. Plaintiffs will demonstrate, in rebutting Defendants' justifications, that the voting strength of the overpopulated districts' residents has been sacrificed not in order to *fulfill* some legitimate state objective, but rather at the *expense* of such objectives.

Indeed, as Plaintiffs will also show through expert testimony at the rebuttal stage, the only objective that could explain Act 1 is insufficient to justify its inequalities: a discriminatory policy of favoring Republican

voters and disfavoring Democratic voters. It is true that legislators may consider politics when choosing one constitutional map over another. But whether or not the partisan consequences of Act 1 are severe enough to strike the plan down under *Davis v. Bandemer*, 478 U.S. 109 (1986), the pure partisan intent that obviously underlies Act 1 can never on its own serve as a "legitimate justification" for violating *Karcher*'s equipopulation standard. *Cf. Kirkpatrick v. Preisler*, 394 U.S. 526, 530, 533 (1969) (rejecting State's argument that practical political considerations justified population deviations). "[T]here are some reasons upon which the government may not rely," *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and a citizen=s political belief structure is first among them. *See, e.g.*, *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976).

Thus, plaintiffs expect the March 11-12 hearing record to demonstrate that no legitimate justification supports the population inequalities that Act 1 creates. A hearing structure that permits each side to attempt to carry its burden, subject to rebuttal from the other side, will reveal this to be true in a fair and efficient way.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Divide March 11-12 Hearing should be granted.

Respectfully submitted,

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Dated: March 1, 2002

114

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

FILED
HARRISBURG, PA
AUG 13 1992
LANCE S. WILSON, CLERK
PER _____ DEPUTY CLERK

CHESTER NERCH, HERBERT BARNESS, CLARENCE THOMPSON, JOSE HERNANDEZ, MATTHEW RYAN, F. JOSEPH LOEPER, D. MICHAEL FISHER, MICHELLE AGATSTON, LUIS CRUZ and LAWRENCE R. WATSON, II,

Plaintiffs,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth of Pennsylvania, and WILLIAM BOEHM, as Commissioner of the Bureau of Commissions, Elections and Legislation, Department of State of the Commonwealth of Pennsylvania,

Defendants.

Civil Action No. 3:CV-92-0095

BEFORE: STAPLETON, Circuit Judge, and RAMBO and POLLAK, District Judges

OPINION OF THE COURT

Certified from the record
Date 8/13/92
Lance S. Wilson, Clerk
Per _____ Deputy Clerk

PER CURIAM:

This case presents a challenge to the plan for congressional redistricting adopted by the Pennsylvania Supreme

Ex A

Court on March 10 of this year. That plan is now in force and will, unless found deficient by this court, constitute the basis for the elections to be held in November of this year, and every second November thereafter in this decade, for Pennsylvania's delegation to the United States House of Representatives. The challenge to the plan is dual: plaintiffs contend that the population discrepancies among certain of the newly delineated districts offend the constitutional principles of equality embodied in the "one-person one-vote" doctrine. Further, plaintiffs contend that the redrawn second congressional district, in Philadelphia, and fourteenth congressional district in Allegheny County (Pittsburgh and environs), will operate to reduce the voting strength of African-Americans in those districts in a manner that contravenes Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the fifteenth amendment to the United States Constitution.

I.

Throughout the 1980s, the Pennsylvania delegation in the United States House of Representatives numbered twenty-three. But, towards the end of the decade, the political truth began to sink in that twenty-three was a high-water mark from which Pennsylvania would, in the 1990s, recede. It was clear that the population of the northeastern states was becoming a progressively smaller fraction of the national population--diminishing relative to the

growing populations of the south and west--and hence Pennsylvania (and New York and other large northeastern states) would lose representation in the House. The precise degree of that loss would turn on the population figures officially declared by the 1990 decennial census. The census, formally ratifying the massive demographic shifts that had been in progress for a number of years, would dictate the apportionment of House seats among the fifty states during the last decade of the century.

On December 31, 1991, the Clerk of the House of Representatives advised the Secretary of the Commonwealth of Pennsylvania that, beginning with the 1992 elections, Pennsylvania would be entitled to only twenty-one seats in the House. And so it fell to the Pennsylvania General Assembly to perform its constitutional responsibility to redraw the congressional map of Pennsylvania, providing for twenty-one rather than twenty-three districts. Four weeks passed. The General Assembly--the Democratic-controlled House and the Republican-controlled Senate--dithered and did nothing.

On January 28, 1992--the first day on which nominating petitions could be circulated for the April 28 primary elections--eight Democratic state senators, led by Senator Robert J. Mellow, filed suit in the Pennsylvania Commonwealth Court. The suit asked that the existing regime of twenty-three congressional districts be declared unconstitutional and that, in default of General Assembly adoption of a proper twenty-one district regime, the court

promulgate a valid plan. Concurrently, the Mellow plaintiffs moved the Pennsylvania Supreme Court to take jurisdiction of the case. The named defendants were Acting Secretary of the Commonwealth Brenda K. Mitchell and Commissioner William Boehm of the Commonwealth's Bureau of Commissions, Elections and Legislation.

The following day, two suits similar to the Mellow suit were filed in federal district courts seeking judicial invalidation of the existing twenty-three district regime and, in default or action by the General Assembly, judicial promulgation of a valid twenty-one district plan. One of the suits was brought in the Middle District of Pennsylvania, by Chester Nerch, Treasurer of the Lackawanna County Democratic Committee. The other suit was brought in the Eastern District of Pennsylvania by three plaintiffs: Herbert Barness, a voter in the eighth congressional district; Clarence Thompson, an African-American voter in the first congressional district; and Jose Hernandez, an Hispanic voter in the first congressional district. The defendants in both suits were Secretary Mitchell and Commissioner Boehm.

The Barness suit was transferred from the Eastern District to the Middle District, the district in which Secretary Mitchell and Commissioner Boehm are officially domiciled. The Barness and Nerch suits were consolidated, and a three-judge court was convened, as is required "when an action is filed challenging the constitutionality of the apportionment of congressional

districts. . . ." 28 U.S.C. § 2284(a). By agreement of the parties, the consolidated federal court actions were stayed.

On January 30, in the Mellow suit in the Commonwealth Court, Judge Barry (1) granted a preliminary injunction declaring unconstitutional the redistricting scheme in effect at that time and (2) directed that any proposed redistricting plans be filed in the Commonwealth Court by February 11. On February 12, President Judge Craig scheduled a hearing to begin on February 13, to consider the plans filed. On February 13, the Pennsylvania Supreme Court, acting pursuant to 42 Pa. Cons. Stat. Ann. § 726 (1981), which authorizes the Pennsylvania Supreme Court to take plenary jurisdiction of proceedings in any Pennsylvania court "involving an issue of immediate public importance," assumed jurisdiction over Mellow. Simultaneously, the Pennsylvania Supreme Court directed Judge Craig, sitting as a Special Master, to conduct the scheduled hearing and to submit a report by February 26.

On February 14, Representative Matthew Ryan, the Republican leader in the lower house of the General Assembly and an intervenor in the Mellow state court suit, filed a federal court complaint in the Middle District. The Ryan suit was consolidated with the stayed Nerch and Barness suits. Thereupon Representative Ryan sought to vacate the stay so that he might move in this court for a preliminary injunction halting the state court proceedings over which the Pennsylvania Supreme Court had assumed plenary jurisdiction.

114

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I.

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On January 2[illegible] 1992--the first day on which nominating petitions could be circulated for the April 28 primary elections--eight Democratic state senators, led by Senator Robert J. Mellow, filed suit in the Pennsylvania Commonwealth Court. The suit asked that the existing regime of twenty-three congressional districts be declared unconstitutional and that, in default of General Assembly adoption of a proper twenty-one district regime, the court

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On February 14, Representative Matthew Ryan, the Republican leader in the lower house of the General Assembly and an intervenor in the Mellow state court suit, filed a federal court complaint in the Middle District. The Ryan suit was consolidated with the stayed Nerch and Barness suits. Thereupon Representative Ryan sought to vacate the stay so that he might move in this court for a preliminary injunction halting the state court proceedings over which the Pennsylvania Supreme Court had assumed plenary jurisdiction.

true, we have difficulty perceiving that irreparable injury to a federally protected interest of any of the Ryan plaintiffs is likely to occur as a result of the Pennsylvania Supreme Court's moving forward to formulate and approve a reapportionment plan. As presently advised, we see no reason to doubt that the Pennsylvania Supreme Court is in a position at this point to formulate and approve such a plan substantially before this court would be able to do so, and it would appear to us to be in the public interest for a plan to be formulated and approved at the earliest possible time. If this is correct, it suggests that the appropriate action for this court is to stay its hand until the Pennsylvania Supreme Court acts. This would in turn mean that if the Pennsylvania Supreme Court approves a plan that any of the Ryan plaintiffs (who has adequate standing to raise the pertinent issue(s)) maintains is inconsistent with the Voting Rights Act and/or the Constitution, he or she would be able to file a renewed application for relief.

Meanwhile, on February 24, Judge Craig, as Special Master, filed a detailed report dealing with issues both of fact and of law. Judge Craig recommended that the Pennsylvania Supreme Court adopt a plan designated as Mellow 2, the second of two plans submitted by the Democratic plaintiff-senators who had initiated the state court suit. Judge Craig found Mellow 2 to be superior to the other plans considered, including one submitted by Senator Loeper. A plan proposed by Representative Ryan was not considered by Judge Craig on the ground that it was not submitted until February 12, a day after the February 11 deadline set by Judge Barry on January 30.

On February 27, before addressing the motion for a preliminary injunction, this court granted certain motions for intervention and remitted other would-be intervenors to amici curiae status. In all subsequent phases of the federal court litigation the active participants have been (1) the six Ryan plaintiffs, (2) defendants Mitchell and Boehm, (3) the eight Mellow defendant-intervenors, and (4) defendant-intervenors Democratic Representatives Harold James, Anthony Williams, Curtis Thomas and Vincent Hughes and the Philadelphia Leadership Conference and the Frederick Douglass Society. An additional group of defendant-intervenors, Speaker of the Pennsylvania House of Representatives Robert W. O'Donnell, and two of his fellow Democratic members of the House leadership, have played a more circumscribed role--opposing the contentions of the Ryan plaintiffs and generally supportive of the positions taken by the other defendant-intervenors and by defendants Mitchell and Boehm. The original federal court plaintiffs--Nerch and the Barness group--have been quiescent since the mid-February dissolution of the stay.

At the February 27 hearing no testimony was presented. Argument was had on the questions of law posed by the Ryan plaintiffs' motion for a preliminary injunction and the defendants' and defendant-intervenors' request that we abstain. The motion for a preliminary injunction was denied and the motion to abstain was reserved.

On March 10, the Pennsylvania Supreme Court announced that it had adopted Mellow 2, the redistricting plan recommended to it by Judge Craig. On March 26, the court filed a unanimous opinion, written by Justice Papadakos, explaining its conclusions that Mellow 2 satisfies the Constitution's "one-person one-vote," mandate and that it fulfills the requirements of Section 2 of the Voting Rights Act.

On March 30, March 31, and April 1, this court heard evidence and arguments with respect to the Ryan plaintiffs' claims that Mellow 2, is unconstitutional and contravenes the Voting Rights Act. Also, defendants Mitchell and Boehm orally moved for dismissal for lack of subject-matter jurisdiction: they contended that if this court were to retain jurisdiction and inquire into the merits of the redistricting plan promulgated by the Pennsylvania Supreme Court, such an inquiry would constitute federal district court review of a decision of the highest court of a state, a form of lower federal court intervention in the state judicial process foreclosed by the so-called "Rooker-Feldman doctrine." Since the other parties had not had prior notice of the Mitchell-Boehm motion to dismiss, decision on that motion was reserved. Also, argument was heard on a motion filed by the Mellow intervenors asking this court to stay its hand on grounds of "Younger abstention." At the close of the three-day hearing, it was agreed that, after the hearing record was transcribed, (1) the parties would file briefs addressing the merits issues and the jurisdiction and abstention

issues, and (2) final argument would be had following submission of the briefs. Pursuant to these arrangements, comprehensive briefs were filed, and, on May 19, extended argument was presented.

II.

We first consider two threshold questions: (1) whether we have subject-matter jurisdiction and (2), if so, whether we should nonetheless abstain.

A. Rooker-Feldman

In Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), the Court held that a federal district court lacked jurisdiction over a suit which sought a declaration of the unenforceability, on various federal constitutional grounds, of a civil judgment rendered in a state trial court and affirmed by the state supreme court. The Court's holding appeared to be an unsurprising application of the principle, central to the mutually supportive structures of the federal and state judiciaries since 1789, that state court rulings on issues of federal law are not reviewable by any federal tribunal other than the Supreme Court of the United States on appeal from or writ of certiorari to the highest state court in which judgment can be had. "Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character." Id. at 416.

Rooker, decided in 1923, slept undisturbed for almost six decades. Then, after scholarly reexamination, Chang, Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts, 31 Hastings L. J. 1337 (1980), the venerable case was cited approvingly by the Supreme Court in D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983). In Feldman two candidates for admission to the District of Columbia bar brought suit in the United States District Court for the District of Columbia to challenge, on constitutional grounds, determinations by the District of Columbia Court of Appeals--the highest court in the local District of Columbia court structure--that the plaintiffs were ineligible for admission. The ineligibility arose from the plaintiffs' failure to satisfy an established admissions requirement prescribed by the District of Columbia Court of Appeals in the exercise of its statutory authority over bar membership in the District of Columbia. The requirement was that the applicant for admission be a graduate of a law school approved by the American Bar Association. One of the plaintiffs was a retired Navy pilot who had graduated from an unapproved law school. The other plaintiff had taken a number of law courses but was not a law school graduate; he was, however, admitted to practice both in Virginia and in Maryland, and he had in fact practiced law for several years. The refusal of the District of Columbia Court of Appeals to waive its rule in these two instances was challenged, on constitutional grounds, in the United States District Court for the

District of Columbia. That court dismissed on jurisdictional grounds: "the admission and exclusion of attorneys by the highest court of a state is the exercise of a judicial function which may be reviewed only by the United States Supreme Court." The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the two decisions of the District of Columbia Court of Appeals not to waive its rule at plaintiffs' behest "were not judicial in the federal sense, and thus did not foreclose litigation of the constitutional contentions in the District Court." Feldman v. Gardner, 661 F. 2d 1295, 1298 (D.C. Cir. 1981). The Supreme Court, speaking through Justice Brennan, reversed, agreeing with the district court that each of the two District of Columbia Court of Appeals non-waiver decisions was "a judicial proceeding." 460 U.S. at 481. And "[r]eview of such determinations can be obtained only in this Court. See 28 U.S.C. § 1257. See also Atlantic Coast Line R. Co. v. Locomotive Engineers, 398 U.S. 281, 296 (1970); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415, 416 (1923)." 460 U.S. at 476. Thus did Rooker's platitude become the "Rooker-Feldman doctrine." Justice Brennan's opinion was, however, at pains to define the limits of the Court's holding: although the district court lacked jurisdiction to entertain challenges to the rule as applied, the district court had jurisdiction to entertain challenges to the rule as adopted, because the adoption of a bar admission rule did not appear to be a judicial proceeding. Id. at 486. Cf. P. Bator, D.

Meltzer, P. Mishkin & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System (3d. ed. 1988) 1632-38.

Defendants Mitchell and Boehm argue that, if this court proceeds to examine the constitutionality of the Pennsylvania Supreme Court plan, it will be pursuing exactly the course--review of a decision of the highest court of a state--that Rooker-Feldman bars district courts from undertaking and remits to the exclusive authority of the Supreme Court of the United States.

It is true that the Pennsylvania Supreme Court measured Mellow 2 against the "one-person one-vote" requirement and found that it passed muster. And it is also true that the Pennsylvania Supreme Court, in a section of its opinion captioned "Section 2 of the Voting Rights Act," announced that it agreed with Judge Craig that Mellow 2 "best protected minority voting rights." Mellow v. Mitchell, 607 A.2d 204, 208-210 (Pa. 1992). Further, it is true that the Pennsylvania Supreme Court went on specifically to find that: (1) Mellow 2 "did not effectively dilute minority voting strength in the Second Congressional District," id. at 208 (emphasis in original); (2) "all plans except [Mellow 2] did dilute minority voting strength in the First Congressional District," id. (emphasis in original); and (3) with respect to the fourteenth congressional district, "[n]either the Loeper intervenors nor anyone else has offered any evidence regarding the degree of influence presently enjoyed by minority voters in Allegheny County, much less any evidence that such influence would be impaired by the

small reduction [from 23% to 17.81%] in the African-American percentage in a district that already has a relatively small African-American population." Id. at 210 n.3. Moreover, we agree with defendants Mitchell and Boehm that the decision of the Pennsylvania Supreme Court, reflected in its carefully crafted opinion, was a judicial act--not, as the Ryan plaintiffs contend, a legislative act outside the rubric of Rooker-Feldman.

However, in one major respect the situation at bar is unlike the situation presented in Rooker and in Feldman. Both in Rooker and in Feldman the party seeking to invoke district court jurisdiction had participated--and had lost--in the prior proceeding sought to be circumvented, or to be collaterally attacked, in the district court. In the situation at bar, certain of the Ryan plaintiffs--Representative Ryan, and Senators Loeper and Fisher--were parties to the state court litigation; but others--Ms. Agatston and Messrs. Cruz and Watson--were not.

As the Court of Appeals for the Third Circuit recently observed in a very similar setting:

> [T]he Rooker-Feldman doctrine has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion. See Wright, Miller & Cooper [Federal Practice and Procedure], § 4469 at 668 ("Although no substantial harm seems to have been done by the jurisdictional cases, it would be better to go straight to the res judicata rules that justify preclusion"). The basic premise of preclusion is that non-parties to a prior action are not bound. . . .
>
> We have found no authority which would extend the Rooker-Feldman doctrine to persons

not parties to the proceedings before the state supreme court and are referred to none.

Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992),[2]

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2. The Valenti excerpt from the Wright & Miller treatise on federal practice and procedure is taken from a longer discussion which warrants quotation (§ 4469 at pp. 663-68, footnotes omitted):

> Many decisions, drawing from Rooker v. Fidelity Trust Co., have transformed res judicata doctrine into a rule that lower federal courts lack jurisdiction to review state courts. The Rooker case itself was framed as a bill in equity for relief from a state court judgment that was claimed to violate the contract clause, the due process clause, and other federal prohibitions. The Court's opinion makes it clear that it could not find any ground for collateral attack on the judgment--it found the bill to be "merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of" full state court jurisdiction. It also stated, however, that "[u]nder the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors" of constitutional law. This jurisdictional transmutation of res judicata doctrine seems entirely unnecessary. To be sure, it seems elementary that the statutes giving the Supreme Court jurisdiction to review state court judgments should be read with the statutes conferring original jurisdiction on lower federal courts to establish that direct review of state courts can be had only in the Supreme Court. The rare cases that are expressly framed as an appeal from a state court to a lower federal court may reasonably be dismissed for lack of jurisdiction. Most of the cases, however, involve some form of direct attack on the state judgment or involve simple redundant litigation. For these cases, jurisdictional doctrine seems unnecessary and potentially mischievous. Some courts that have noted the jurisdictional doctrine have indicated a

(continued...)

On the face of the record, it would therefore appear that, while Rooker-Feldman precludes our consideration of the claims of Representative Ryan and Senators Loeper and Fisher, it is no bar to our consideration of the claims of Ms. Agatston, Mr. Cruz and Mr. Watson.

Defendants Mitchell and Boehm argue, however, that Ms. Agatston and Messrs. Cruz and Watson should be treated as "in privity" with Messrs. Ryan, Loeper and Fisher and hence bound by the Pennsylvania Supreme Court ruling and foreclosed from

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2. (...continued)
preference for res judicata or other grounds of decision. The doctrine has never been expanded to the logical corollary that as between two federal district courts res judicata is a matter of jurisdiction, since exclusive jurisdiction for appellate review lies in the courts of appeals. A jurisdictional approach is an open invitation to apply federal rules of preclusion without careful thought as to the content of state rules or any possible justifications for ignoring them. Jurisdictional perspectives might expand the number of persons affected by a judgment, and cause confusion as to the effects of dismissing the federal action. Any possible advantage in the doctrine that jurisdictional questions can be raised sua sponte can be parallelled by the power to raise res judicata sua sponte. Even in the special case in which the Supreme Court has dismissed an appeal from the state judgment for want of a substantial federal question, it is better to rely on the res judicata effects of the Supreme Court's decision than to invoke a jurisdictional doctrine. Although no substantial harm seems to have been done by the jurisdictional cases, it would be better to go straight to the res judicata rules that justify preclusion.

litigating in this court by Rooker-Feldman. But the claim of "privity" appears, on examination, to be nothing more than an allegation that Ms. Agatston and Messrs. Cruz and Watson are of the same political persuasion--Republican--as Messrs. Ryan, Loeper and Fisher, and closely tied to their political interests. Nothing in the record suggests that there was any bad faith or other disingenuity attendant on the non-participation of Ms. Agatston and Messrs. Cruz and Watson in the state court litigation. "A non-party is not precluded from relitigating matters decided in a prior action simply because it passed by an opportunity to intervene." Valenti, 962 F.2d at 297.

To bolster their argument that Ms. Agatston and Messrs. Cruz and Watson should be regarded as bound by the state court judgment, defendants Mitchell and Boehm contend that Ms. Agatston and Messrs. Cruz and Mitchell had standing to petition the Supreme Court of the United States for a writ of certiorari to the Pennsylvania Supreme Court. But, on oral argument before this court, defendants Mitchell and Boehm were not able to cite authority for the proposition that non-parties to a state court proceeding have standing to petition for certiorari. May 19, 1992 Oral Arg. Tr., at 57-9. The point has an importance that connects with, but also transcends, the res judicata question. As already noted, the basic significance of Rooker-Feldman is that it underscores the central architectural theme of American jurisprudence that decisions of the highest court of a state on

issues of federal law are reviewable only by the Supreme Court of the United States. But in the present circumstance it is not apparent that any litigant before the Pennsylvania Supreme Court was positioned to challenge before the Supreme Court of the United States that portion of the decision of the Pennsylvania Supreme Court holding that the second and fourteenth congressional districts, as projected in Mellow 2, comport with Section 2 of the Voting Rights Act. Our examination of Judge Craig's and Justice Papadakos' opinions reveals no African-American litigant who, as a voter in either the second or fourteenth congressional district, was challenging Mellow 2 on that ground in the Pennsylvania Supreme Court.[3] To that extent, therefore, a timely petition for certiorari to the Pennsylvania Supreme Court, had one been filed,[4] could not have brought before the Supreme Court of the United States the full range of issues presented to this court.

We conclude that the three Ryan plaintiffs not parties to the state court litigation are not in privity with Representative

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3. The Pennsylvania Supreme Court also discussed the impact of redistricting in the first congressional district, concluding that Mellow 2 enhanced African-American voting strength more than any other plan the court considered. We know of no African-American voter from the First Congressional District contesting that finding in the state proceeding. In this court, we think that Mr. Cruz--an Hispanic voter in the first congressional district--lacks standing to press the issue of the adequacy of African-American voting strength in the first congressional district.

4. It is our understanding that the date by which a certiorari petition would have to have been filed was June 8, 1992, and that no petition had in fact been filed by that date.

Ryan and Senators Loeper and Fisher. Accordingly, while Rooker-Feldman does signify that the Ryan, Loeper and Fisher claims are not cognizable, it is no bar to the Agatston, Cruz and Watson claims.[5] We also conclude that all three of these plaintiffs have standing to challenge the conformity of the Pennsylvania Supreme Court plan with "one-person one-vote." Moreover, Ms. Agatston, as an African-American voter in the projected fourteenth congressional district, has standing to challenge the alleged dilution of African-American voting strength in that district; similarly, Mr. Watson, as an African-American voter in the projected second congressional district, has standing to challenge the alleged dilution of African-American voting strength in that district.

B. Younger Abstention

The Mellow defendant-intervenors contend that, pursuant to the principles of abstention first enunciated in Younger v. Harris, 401 U.S. 37 (1971), and elaborated in subsequent cases, it is this court's duty to stay its hand, given that a previously

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5. See May 19, 1992 Oral Arg. Tr. at 57:

> JUDGE STAPLETON: So unless we find all of the plaintiffs in privity, you lose this argument?
>
> MR. DUNLAP: I do. I do, unless there is a privity argument--I lose the argument on Rooker-Feldman. Only--if the three minority plaintiffs in this case are not in privity with the three plaintiffs who concededly were in the state court, then under Valenti I don't think I can win.

begun state court proceeding involving important state interests, constituted an adequate vehicle for addressing whatever federal constitutional issues the Ryan plaintiffs have raised in this court.

Younger v. Harris was, in its inception, an elaborately magisterial statement of what was, conceptually, a relatively modest doctrinal demarche. As the Court put the matter in Samuels v. Mackell, 401 U.S. 66, 69 (1971), one of Younger's companion cases, "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations where necessary to prevent immediate irreparable injury." In later cases, Younger outgrew its beginnings. In Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423 (1982), the Court, speaking through Chief Justice Burger, declared:

> The policies underlying Younger are fully applicable to noncriminal judicial proceedings when important state interests are involved. . . . "[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . ."

Id. at 432 (quoting Gibson v. Berryhill, 411 U.S. 564 (1973)).

There is no doubt that important state interests, involving every resident of the Commonwealth, are involved in the process of congressional redistricting. The magnitude and scope of those interests are matched only by the magnitude and scope of the federal interests in assuring full compliance with federal

constitutional and statutory norms. As we have had occasion to point out, the Pennsylvania Supreme Court's opinion addressed not only the constitutional "one-person one-vote" issues, but also the Voting Rights Act issues which, because under the supremacy clause federal statutes are paramount to state law, are themselves matters of constitutional dimension. But when we inquire, as Middlesex instructs, "whether the state proceedings afford an adequate opportunity to raise the constitutional claims," 457 U.S. at 432, we conclude that the answer is in the negative. The answer is in the negative because, as we have noted in our discussion of Rooker-Feldman, there apparently was no party to the state court proceedings who would have had standing to seek review by the Supreme Court of the United States of the Pennsylvania Supreme Court's rulings on the Voting Rights Act questions. To that extent, an essential predicate of Younger--that state courts are, as a general matter, as competent as federal courts to address federal claims subject to ultimate review by the Supreme Court--is, in this instance, unfulfilled, because, if certiorari to the Pennsylvania Supreme Court had been sought, the Supreme Court of the United States would have had truncated revisory authority. Accordingly, we conclude that Younger abstention would be inappropriate in this case.[6]

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6. Whether, in any event, congressional redistricting cases lie outside the Younger framework is a question which, in view of our determination that the ingredients of Younger are not present in (continued...)

III.

We now turn to the Ryan plaintiffs' argument that the redistricting[7] plan adopted by the Pennsylvania Supreme Court is unconstitutional.

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6. (...continued)
this case, we need not address. Only one instance of Younger abstention in a congressional redistricting case has come to our attention. Members of the California Democratic Congressional Delegation v. March Fong Eu, 1992 U.S. Dist. LEXIS 5737 (N.D. Cal., March 3, 1992). In that case the three-judge court was divided: Judge Tang filed a strong dissent to Judge Legge's opinion of dismissal.

We also need not consider whether abstention would have been compatible with our stance in denying the Ryan plaintiffs' motion for a preliminary injunction against the state court proceedings. Denial of the motion presupposed that the Ryan plaintiffs could return to this court if unsatisfied with the action of the Pennsylvania Supreme Court. See note 1, supra, and following text.

7. Although the terms "reapportionment" and "redistricting" have frequently been used interchangeably, technically this case deals with redistricting. See Davis v. Bandemer, 478 U.S. 109, 161 n.1 (1986) (Powell, J., concurring in part, dissenting in part) ("Technically, the words 'apportionment,' and 'reapportionment' apply to the 'allocation of a finite number of representatives among a fixed number of pre-established areas,' while 'districting' and'redistricting' refer to the drawing of district lines"). After the census, the President receives the relevant data from the Secretary of Commerce, "reapportions" the 435 House seats among the states, and sends a statement to Congress outlining the reapportionment. Franklin v. Massachusetts, 60 U.S.L.W. 4781 (U.S. June 26, 1992). The Clerk of the United States House of Representatives then informs each of the states of the number of representatives to which it is entitled. At that point, those states that are entitled to more than one representative proceed to "redistrict" their states to take into account shifts in population and, potentially, an increase or decrease in the number of congressional districts.

A.

Art. I, § 2 of the Constitution of the United States provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

In a line of cases dating from the 1960s, the Supreme Court has interpreted the Constitution's mandate that representatives be elected "by the People of the several States" to require that every vote cast in a congressional election be, "as nearly as practicable," equal to every other. Wesberry v. Sanders, 376 U.S. 1, 7 (1964). See also Karcher v. Daggett, 462 U.S. 725 (1983); White v. Weiser, 412 U.S. 783 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).[8] In other words, when tackling redistricting

8. Some members of the Court have preferred to analyze congressional redistricting cases under the same standard as legislative reapportionment cases, i.e., the equal protection clause of the fourteenth amendment. See Karcher, 462 U.S. at 747 (Stevens, J., concurring) ("Even if Art. I, §2, were wholly disregarded, the "one person, one vote" rule would unquestionably apply to action by state officials defining congressional districts just as it does to state action defining state legislative districts [through the Equal Protection Clause."); Wesberry, 376 U.S. at 19 (Clark, J., concurring in part, dissenting in part) (same); Colgrove v. Green, 328 U.S. 549, 569 (1946) (Black, J., dissenting) (same). Other members of the Court have found nothing in the Constitution to support this principle. See, e.g., Wesberry, 376 U.S. at 20 (Harlan, J., dissenting).

problems, state legislatures[9] are to strive for absolute mathematical equality in population among congressional districts. The courts and commentators have widely referred to this standard as the "one-person one-vote" rule. See, e.g., Wesberry, 376 U.S. at 18 (Clark, J., concurring in part, dissenting in part).

The Court's decisions following Wesberry have steadfastly refused to interpret the one-person one-vote standard as anything but a call to mathematical exactness. For instance, in Kirkpatrick, the Court rejected Missouri's invitation to fix some level of population deviation among districts small enough to be considered de minimis and therefore automatically constitutional. Kirkpatrick, 394 U.S. at 530. Moreover, in Karcher, the Court refused to conclude that maximum population deviations smaller than the predictable undercount in census data are beyond judicial scrutiny. Karcher, 462 U.S. at 731. These cases demonstrate that mathematical equality in redistricting remains the lodestar--there are no de minimis deviations.

The Court has based its adherence to the "unusual rigor of th[is] standard," id. at 732, on two grounds. First, "[i]f state legislators knew that a certain de minimis level of population differences was acceptable, they would doubtless strive to achieve that level . . . ." Id. at 731. Accordingly, because

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9. Of course, the state and federal courts are also subject to this standard when, as all too often is the case, the task of formulating a constitutional redistricting plan falls on the shoulders of the judiciary.

the Constitution requires that plan drafters endeavor to attain some level of arithmetic exactness, it might as well be equality rather than something less than equality. Second, as census-taking techniques and computer technology continue to improve by leaps and bounds, attaining the ideal of population equality is more and more possible. Id. at 731. This reasoning recognizes the fact that although the ten years between each round of redistricting is merely half of a generation in human terms, the same period represents several generations of computer software. Therefore, the rigor of the "as nearly as practicable" standard necessarily takes into account the fact of modern life that the impossibility of yesterday may be the "practicability" of today.[10]

The current round of cases demonstrates that the computer technology associated with this task of redistricting has reached the point predicted by Justice Fortas in his concurring opinion in Kirkpatrick. It is now apparently possible for computer generated

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10. Two opinions of Justice White in this area separated by fourteen years demonstrate the wisdom of crafting a standard that responds to changes in technology. Compare Wells v. Rockefeller, 394 U.S. 542, 553 (1969) (White, J., dissenting) ("As a rule of thumb, a variation between the largest and smallest district of no more than 10% to 15% would satisfy me, absent quite unusual circumstances not present in any of these cases. At the very least, at this trivial level, I would be willing to view state explanations of the variance with a more tolerant eye.") with Karcher, 462 U.S. at 782 (White, J., dissenting) ("Although I am not wedded to a precise figure, in light of the current range of population deviations, a 5% cutoff appears reasonable. I would not entertain judicial challenges, absent extraordinary circumstances, where the maximum deviation is less than 5%. Somewhat greater deviations, if rationally related to an important state interest, may also be permissible.")

redistricting plans to "run[] the congressional district line down the middle of the corridor of an apartment house or even divide the residents of a single family house between two districts." Kirkpatrick, 394 U.S. at 538 (Fortas, J., concurring). See, e.g., Hastert v. State Bd. of Elections, 777 F. Supp. 634, 644 (N.D.Ill. 1991) ("Of the 20 proposed congressional districts in the Hastert plan, 18 contain the ideal population of 571,530. The remaining two districts have populations of 571,531."); see also Plaintiffs' Ex. #12 (purporting to divide state of Pennsylvania into 11 districts containing 565,793 people and 10 districts containing 565,792).[11]

The advent of such technology combined with the rigor of the standard, however, does not signal the end of judicial review of state redistricting. The analysis of proposed redistricting plans is not a wholly mechanical undertaking, where the plan with the lowest deviation from the ideal wins no questions asked. Proof of the existence of a plan with lower deviations merely satisfies the plaintiff's prima facie case. The Supreme Court in Karcher stated:

> [T]wo basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been

11. Because under the current census figures, the total population of the Commonwealth of Pennsylvania is not evenly divisible by the number of House seats allotted to the Commonwealth, only Solomon is wise enough to create a redistricting plan with zero deviation.

> reduced or eliminated altogether by a good-faith effort to draw district lines of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Karcher, 462 U.S. at 730-31. Clearly, then, once a plaintiff comes forward with credible evidence that the overall deviations in the plan proffered by the state could be reduced, the burden shifts to the state to justify the deviations in its plan by reference to legitimate state interests furthered by the deviation.

The Court went on in Karcher to enumerate several legitimate goals other than population equality that a state might pursue in redistricting. "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." Id. at 740.[12]

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12. This holding of Karcher that a state has the opportunity to rebut the plaintiff's prima facie case by justifying the deviations in its redistricting plan apparently overrules statements made in the Court's earlier redistricting cases. See Kirkpatrick, 394 U.S. at 533-34 ("[W]e do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."); Mahan v. Howell, 410

(continued...

Moreover, while a state must justify each specific deviation rather than relying upon general assertions, the burden on the state is flexible--i.e., the larger the deviation, the heavier the burden of justification. Id. at 741.

B.

With this above understanding of the law of redistricting in mind, we now proceed to apply this understanding to the challenged plan adopted by the Pennsylvania Supreme Court. The plan divides the total population of the Commonwealth, 11,881,643 people, into twenty-one congressional districts of varying sizes. The ideal population of any district is 565,793 people. The following chart, reflecting the congressional districts as established in the Pennsylvania Supreme Court plan, shows the total population of each district and the deviation from the ideal in both numbers of people and percentage of population.

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12. (...continued)
U.S. 315, 341 (1973) (Brennan, J., concurring in part, dissenting in part) ("[T]he need to preserve the integrity of political subdivisions as political subdivisions may, in some instances, justify small variations in the population of districts from which state legislators are elected. But that interest can hardly be asserted in justification of malapportioned congressional districts."); see also Karcher, 462 U.S. at 778-780 (White, J., dissenting). Cf. White v. Weiser, 412 U.S. 783, 795-97 (1973) (In remedy phase, court must follow the policies and preferences of the state, "whenever adherence to state policy does not detract from the requirements of the Federal Constitution.")

Cong. District	Population	Deviation	% Deviation
District 1	565,768	-25	-0.0044%
District 2	565,815	+22	0.0039%
District 3	565,775	-18	-0.0032%
District 4	565,792	-1	-0.0002%
District 5	565,813	+20	0.0035%
District 6	565,786	-7	-0.0012%
District 7	565,760	-33	-0.0058%
District 8	565,787	-6	-0.0011%
District 9	565,803	+10	0.0018%
District 10	565,796	+3	0.0005%
District 11	565,798	+5	0.0009%
District 12	565,794	+1	0.0002%
District 13	565,767	-26	-0.0046%
District 14	565,787	-6	-0.0011%
District 15	565,810	+17	0.0030%
District 16	565,798	+5	0.0009%
District 17	565,817	+24	0.0042%

Cong. District	Population	Deviation	% Deviation
District 18	565,781	-12	-0.0021%
District 19	565,779	-14	-0.0025%
District 20	565,815	+22	0.0039%
District 21	565,802	+9	0.0016%

13. The numbers contained in the table are in two ways different from those contained in the appendix to the Pennsylvania Supreme Court's opinion in this matter. First, the supreme court appendix listed the total population of the new first congressional district as 565,802 rather than 565,768. If the former is correct, the first district would be 9 people over the ideal rather than 25 people under. However, other papers submitted by the parties, e.g., defendant's exhibit #1 and Attachment A to plaintiffs' post-trial brief, list the population of the first district as that listed in the above chart. We have concluded that the number set out in the chart is correct and that the population listed in the supreme court opinion is a typographical error. Otherwise, the supreme court plan accounts for a greater total population for the Commonwealth than that reported by the Census Bureau.

The second difference between the chart and the Pennsylania Supreme Court opinion is the shift of one census block consisting of 6 people between the seventh and sixteenth congressional districts. This problem apparently arises because part of Birmingham Township in Chester County is discontiguous from the rest of the township because it is split by a waterway. Although the legal description in the Pennsylvania Supreme Court opinion included this block in the sixteenth district, the population figures for the two districts did not reflect this correction. After an initial misunderstanding, the parties agreed at trial that the census block in question was properly considered part of the sixteenth congressional district. Therefore, the numbers in the above chart reflect the addition of those six people in the sixteenth district and their subtraction from the seventh district.

The maximum deviation of this plan is 0.01007%.[14] The average deviation is 13.62 people per district or 0.00241%.

This court ruled during the course of these proceedings, and the defendants conceded in their brief and at oral argument, that the plaintiffs presented sufficient evidence to meet their prima facie case. See Trial Tr. at 83; May 19, 1992 Oral Arg. Tr. at 29. The plaintiffs introduced several plans with lower population deviations than those contained in the Pennsylvania Supreme Court plan. Courts have widely concluded that this type of evidence is sufficient to shift the burden to the defendants to justify the deviations. See, e.g., Karcher, 462 U.S. at 739 n.10; Stone v. Hechler, 782 F. Supp. 1116, 1125 (N.D. W.Va. 1992).

The defendants advanced two justifications for the deviations contained in the Pennsylvania Supreme Court plan. The first justification was the desire to create two minority-in-the majority-districts in Philadelphia in order to comply with the Voting Rights Act. As noted in significant detail below, the first and second congressional districts were drawn with this goal in

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14. The maximum deviation is derived by adding the absolute value of the population deviation of the smallest district to the absolute value of the population deviation in the largest district and dividing that sum by the population of the ideal district. In the supreme court plan, the seventh congressional district is the smallest, 33 people under the ideal. The seventeenth district is the largest, 24 people over the ideal. The sum, 57, divided by th ideal district population of 565,793 yields the maximum deviation- 0.01007%. The maximum deviation of the supreme court plan was affected by the switch of the one census block referred to in note 7. Therefore, the maximum deviation of 0.0111% referred to in the supreme court opinion is actually minutely lower.

mind. The importance of this decision for present purposes, however, is that drawing these districts in this manner had a "ripple effect" in the surrounding congressional districts. See Trial Tr. at 457. Accordingly, the three congressional districts surrounding the City of Philadelphia, the seventh, thirteenth, and eighth congressional districts, are all below the ideal population.

The second, and more pervasive justification for the deviations in the Pennsylvania Supreme Court plan was the desire to avoid splitting municipalities between two congressional districts. As an initial matter, the plaintiffs argue that the defendants have failed to prove that avoidance of municipal splits is actually a legitimate interest of the Commonwealth. They argue that Karcher merely identified avoiding municipal splits as a potential state interest that might justify deviations but that the defendants have failed to prove that it is actually a policy of the Commonwealth. The plaintiffs note in this regard that unlike other states, Pennsylvania has not expressed its interest to avoid municipal splits in its constitution or through legislation.

The constitution and statutes of Pennsylvania are not the only sources of public policy for the Commonwealth. Redistricting plans cannot be drafted without criteria to guide the drafters and in the absence of criteria provided by statute or the constitution the Supreme Court of Pennsylvania had no choice but to conclude that it was authorized to establish those criteria. This conclusion is a matter of Pennsylvania state law and we are bound

by it. Exercising this state-law derived authority, the Pennsylvania Supreme Court identified in its opinion the avoidance of municipal splits as an important public policy of the Commonwealth. Mellow v. Mitchell, 607 A.2d 204 (Pa./1992). Nothing more need be said; we accept this declaration of public policy as the functional equivalent of a similar legislative or constitutional declaration.

There remains, however, the question whether this policy was consistently applied and adequately justifies the deviations in the Supreme Court plan. The defendants presented the testimony of Mark McKillop in order to meet their burden on this issue. Mr. McKillop is a member of the staff of Senator Robert J. Mellow and was responsible for drafting the plan which eventually was adopted by the Pennsylvania Supreme Court. In each and every situation where a district contained more than the ideal population,[15] Mr. McKillop testified that the deviations could have been reduced but

15. For ease of analysis, we will discuss Mr. McKillop's testimony only as it relates to the districts that contain more than the ideal population. Residents of districts with greater than the ideal population are the only residents of the Commonwealth who can claim that their votes are diluted because of the redistricting scheme. Moreover, every deviation in a district with a population above the ideal is obviously related to the deviation in a neighboring district below the ideal. In other words, by justifying the deviations in districts above the ideal, the defendants are necessarily justifying all other deviations.

only by introducing more municipal splits.[16] The defendants rely on this testimony as sufficient justification for each deviation.

The plaintiffs attack the defendants' justification evidence on two grounds. First, they refer to Mr. McKillop's testimony that the Pennsylvania Supreme Court plan splits no municipalities in the western half of the state. This fact demonstrates, the plaintiffs argue, that the policy against splitting municipalities was not consistently applied as required by Karcher. We are not persuaded. Western Pennsylvania is far less populated than the eastern half of the Commonwealth and drawing district boundaries without splitting municipalities is, therefore, significantly more feasible in the west. In this context, at least, it is a non sequitur to argue that the absence of a breach of a municipal boundary in Western Pennsylvania indicates that the policy against such breaches was an inconsistently applied pretext.

The plaintiffs' second attack, while more sophisticated, is no more persuasive. The plaintiffs introduced the testimony of their own mapmaker, James D'Innocenzo. Mr. D'Innocenzo, an employee of the Pennsylvania Senate Republican Caucus, testified

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16. In each case Mr. McKillop testified that the deviations could be lowered by introducing municipal splits: fifth district - Trial Tr. at 461; ninth district - Trial Tr. at 583; tenth district - Trial Tr. at 584; eleventh district - Trial Tr. at 585; fifteenth district - Trial Tr. at 458; sixteenth district - Trial Tr. at 458; seventeenth district - Trial Tr. at 460; twentieth district - Trial Tr. at 459; twenty-first district - Trial Tr. at 459.

that by manipulating the boundary between the sixteenth and seventeenth congressional districts in Lancaster County and shifting 29,000 people between the two, he could reduce the maximum deviation of the entire plan without creating additional municipal splits. As a result, the seventeenth congressional district would no longer be the largest district with 24 people more than the ideal; rather, the twentieth, with 22 people more than the ideal, would be the largest. Further, the difference between the largest and smallest districts would be 55 instead of 57, and the maximum deviation would be 0.00972% instead of 0.01007%.

Contrary to plaintiffs' suggestion we do not think the mathematical exactness standard of Karcher and Kirkpatrick supports this argument. This is not a case presenting the issue of whether a very small, unjustified maximum deviation renders a redistricting plan constitutionally infirm. This is a case in which a state has made a good faith decision to accept a very small departure from the ideal in order to serve an important countervailing interest. Where a court is convinced that any deviations from the ideal in fact resulted from an attempt to serve that countervailing interest, it need not find the plan constitutionally invalid simply because someone else, using the same criteria, manages to think of an alternative that will reduce the maximum deviation by 35-one hundred thousandths of a percentage point.

The Karcher Court indicated that when the burden passes to the state to justify deviations, its "legitimate goal" must be

shown to justify each "significant variance." Karcher, 462 U.S. at 730-31 (emphasis added). We are satisfied that the Pennsylvania Supreme Court's plan represents a good faith effort to serve the two legitimate and important countervailing interests it identified--the creation of a second "minority-in-the-majority" district, and the avoidance of municipal splits--without causing any significant dilution in the vote of any citizen. Accordingly, we refuse to find that plan constitutionally infirm because the maximum deviation could be reduced to a degree having no practical significance.[17]

In sum, we hold that the defendants have sufficiently justified each deviation in the Pennsylvania Supreme Court plan. Therefore, the plan does not run afoul of the one-person one-vote requirement of Art. I, § 2.

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17. Even if computer gymnastics of this sort could establish constitutional infirmity, we would refuse to find infirmity on the facts of this case. Mr. D'Innocenzo switched populations between the sixteenth and seventeenth districts, both of which already contained greater populations than the ideal. Therefore, while votes in the seventeenth district may have been worth marginally more after his adjustment, votes in the sixteenth district would have been diluted further than they already were. Thus, that adjustment did not reduce the maximum deviation by taking voting power from voters theoretically having more than their share and redistributing it to those who theoretically had less than their share. We are aware of no authority requiring the Commonwealth to take such measures in order to produce a constitutional redistricting plan.

IV.

Finally, we address plaintiffs' claims under § 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("VRA") and the fifteenth amendment.

A. The Voting Rights Act

The plaintiffs assert that the Pennsylvania Supreme Court plan violates § 2 of the Voting Rights Act because it decreases African-American political power in two of the proposed districts: the fourteenth congressional district, which encompasses the City of Pittsburgh and some of its northern and western suburbs, and the second congressional district, which lies within the City of Philadelphia.

Section 2 of the Voting Rights Act, as amended in 1982, reads:[18]

> **Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**
>
> **(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or**

18. In City of Mobile v. Bolden, 446 U.S. 55 (1980), the Supreme Court held that, to prove a violation of the fifteenth amendment, a plaintiff must show discriminatory intent on the part of the defendants. In response, Congress amended § 2 of the VRA to make it clear that a showing of such intent was not necessary to prevail under the statute, and that the disparate impact test of White v. Regester, 412 U.S. 755 (1973) should apply. See S. Rep. No. 417, 97th Cong., 2d Sess. 27, reprinted in 1982 U.S.C.C.A.N. 177, 204; see also Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

> political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973(f)(2)], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(2). Thus, § 2 may be violated by either intentionally discriminatory conduct or through facially neutral standards which have a disparate impact on minority voters.

The disparate impact prong employs a "results test" which looks at the totality of circumstances to determine whether "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice." Chisom v. Roemer, 111 S. Ct. 2354, 2364 (1991) (citing S. Rep. No. 417, 97th Cong., 2d Sess. 27, reprinted in 1982 U.S.C.C.A.N. 177, 204).

The Senate Report which accompanied the 1982 amendment to § 2 offers a number of factors for consideration in determining whether a voting standard, practice, or procedure is illegal:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, antisingle shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;[116]
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeal;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

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[116]The courts have recognized that disproportionate educational employment [sic], income level and living conditions arising from past discrimination tend to depress minority

> political participation. Where these conditions are shown, and where the level of African American participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation. [citations omitted].

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S.C.C.A.N. 177, 206-07. The Senate Report also identified two additional factors which may have some relevance in divining the existence of a § 2 violation depending on the circumstances of the individual case:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
>
> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29, 1982 U.S.C.C.A.N. at 207.

No one of these factors is dispositive, nor is any one to be given any more weight than the others. Other factors may also be given consideration. Id. at 28-29, 1982 U.S.C.C.A.N. at 206-07.

The retrogression of the number of minority members in a given district, as has taken place in both districts at issue here, has been held in the past to be a violation of § 2 in certain circumstances. See, e.g., City of Port Arthur v. United States, 459 U.S. 159, 165 (1982) ("the right to vote may be denied by dilution or debasement just as effectively as by wholly prohibiting

the franchise"); Wyche v. Madison Parish Police Jury, 635 F.2d 1151, 1160 (5th Cir. 1981) (viewed against background of past discrimination, boundaries of Louisiana parish which were redrawn so that minority voters were split between districts declared violative of VRA); Kirksey v. Board of Supervisors, 554 F.2d 139, 143, 149 (5th Cir.) (en banc) (reapportionment plan for county offices which fragmented compact group of minority voters into different districts disapproved), cert. denied, 434 U.S. 968 (1977); Buskey v. Oliver, 565 F. Supp. 1473, 1483-85 (M.D. Ala. 1983) (ordinance redrawing city council lines held invalid for diluting African-American votes).

We now turn to the plaintiffs' claims as they relate to each district in turn.

1. The Fourteenth Congressional District

Plaintiffs' first claim under the VRA concerns the fourteenth congressional district. Testimony adduced at trial established that, as configured under the 1982 redistricting plan, this district consisted of the City of Pittsburgh and a number of the urban communities just east of the city but within Allegheny County. Under the 1982 plan, the percentage of African-Americans living in the district was 23.860%; under the plan adopted by the Pennsylvania Supreme Court, the percentage would be 17.811%, a drop of approximately 25%.

In the discussion which follows, we first consider whether the proposed change in the composition of the fourteenth

congressional district reflects intentionally discriminatory conduct. Next we consider whether the proposed change can be expected to have discriminatory effects on minority voters in the fourteenth congressional district that are cognizable under the Voting Rights Act.

a. Allegations of Intent

At the outset, we stress that the plaintiffs have tendered absolutely no evidence of historical discrimination against African-Americans, racially polarized elections, or voting practices or procedures calculated to exclude African-Americans from participation in the political process in Allegheny County.[19] We do not see this silence as rebuttal of plaintiffs' claims, but simply note it as demonstrative of relevant areas of inquiry in which plaintiffs have failed to carry their burden of proof.

The plaintiffs concentrate instead on the fact that the Pennsylvania Supreme Court plan results in a retrogression in the

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19. In their Post-trial Brief, the plaintiffs make the statement that the African-American communities in the City of Pittsburgh, the nearby eastern suburbs, and the former steelmaking communities of the Monongahela River valley are socially, educationally, and economically disadvantaged. This disadvantage, they state, is "sufficient to establish that the members of a minority community have less opportunity than other members of the electorate to participate in the political process and to elect a candidate of their choice." Brief at 59 (citing Emison v. Growe, 782 F. Supp. 427 (D. Minn. 1992)). We place very little weight on this assertion, however, as there was virtually no evidence presented which would tie any of these alleged disadvantages in those communities to voting patterns. Essentially what the court was presented with was a bald factual assertion and then a bald conclusion.

number of African-Americans in the fourteenth congressional district. Initially, they posit that the African-American community in the old fourteenth congressional district was intentionally fragmented by the drafters of the plan, Senator Mellow and his Democratic colleagues in the Pennsylvania Senate. The plaintiffs theorize that the Senate Democrats were intent on drawing the new district lines so that Congressman Santorum, the freshman Republican Congressman in the eighteenth congressional district, would find himself in a district populated by a majority of Democratic voters. Under the 1982 plan, the eighteenth district borders the fourteenth district and covers most of the Pittsburgh suburbs in a horseshoe shaped ring. In the Pennsylvania Supreme Court plan, approximately 30% of the voters in the new eighteenth congressional district are registered Republicans, as opposed to just over 50% in the existing eighteenth. See M. Barone and G. Ujifusa, The Almanac of American Politics 1087 (1992). The only way to accomplish this goal was to fracture the African-American communities of the fourteenth district, plaintiffs argue, and that, given this evidence of intent, the requisite showing of injury under § 2 is diminished. See Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990).

The Supreme Court of the United States has interpreted the intentional discrimination requirement as demanding that in order to show a violation of the fifteenth amendment some type of "racially discriminatory motivation" be present in the enactment of

a procedure or plan. City of Mobile v. Bolden, 446 U.S. 55, 62 (1980); Garza, 918 F.2d at 766. We believe the same kind of showing is similarly necessary to establish a violation of the "intentional discrimination" prong of § 2.

We are far from convinced, however, that any intentional discrimination went into the creation of the new fourteenth congressional district. First, as pointed out by the Mellow intervenors, with the exception of Wilkinsburg, a predominately African-American suburb to the east of Pittsburgh, the vast majority of the Democratic voters funnelled into the new eighteenth congressional district were from the former twentieth, a district which was disbanded. Certainly this fact strongly undercuts the assertion that African-American citizens were discriminated against by being transferred into the eighteenth congressional district from the fourteenth in order to defeat Congressman Santorum in the 1992 election. Second, looking at the overall plan, it would appear that racial discrimination was not on the drafters' agenda, as they added an additional minority majority district in Philadelphia.

The only evidence proffered here with regard to discriminatory intent involves the drafters' admitted political goal of placing Congressman Santorum in a disadvantageous district, and the fact that the minority population in the fourteenth congressional district is decreased by the plan. There is simply no nexus drawn between the intention to disadvantage Congressman

Santorum and using African-American voters as the means to achieve this goal. We see the drafters' conduct as having very little to do with race and very much to do with politics. This is in stark contrast to the facts of two cases which plaintiffs offer as authority for their intentional discrimination claim, Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) and Buskey v. Oliver, 565 F. Supp. 1473 (M.D. Ala. 1983). The plaintiffs in Garza demonstrated that years and years of racial gerrymandering had taken place with the intention of preserving incumbent white city council seats. 918 F.2d at 771. In Buskey, there was clear evidence of a feud between the mayor, who was in charge of the reapportionment of the city council seats, and an African-American councilman whom the mayor deliberately tried to chase from office by reducing the number of African-Americans in his district.

b. Discriminatory Effects

We now address the impact of the Pennsylvania Supreme Court plan on the political power of African-Americans residing in the new fourteenth congressional district and whether that impact--specifically, any political fall-out from reducing the percentage of African-Americans from 23.860% to 17.811%--is sufficient to state a claim under § 2 of the Voting Rights Act.

It is important to note at the outset that the challenged reduction in the percentage of African-Americans resident in the fourteenth congressional district does not involve changing the district from "minority-in-majority" status to "minority-in-

minority" status. Under the 1982 districting which the challenged plan would supersede, African-Americans are now a political minority, constituting slightly under one-fourth of the residents of the fourteenth congressional district. The challenged plan would reduce that minority status somewhat further. The factual question is whether that reduction would constitute a significant diminution of the political influence of African-Americans in the fourteenth congressional district. The legal question is whether, assuming there would indeed be a significant reduction of political influence, such a diminution would be cognizable under § 2.

The legal issue is framed by Thornburg v. Gingles, 478 U.S. 30 (1986). In that case, the Supreme Court identified, in the context of a challenge to a multi-member state legislative district, three threshold requirements to a § 2 challenge:

> First, the minority group must demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters' inability to elect its candidates.[] Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.[] Third, the minority must be able to show that the white majority votes sufficiently as a bloc to enable it--in the absence of special circumstances, such as the minority candidate running unopposed []--usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51 (footnote omitted).

There has been a divergence of opinion among the lower courts as to whether the Gingles requirements apply other than in the context of a challenge to a multi-member district. These holdings are of no small significance in the present case, because the first Gingles factor would require that a minority group constitute a potential majority of voters in a relatively compact district before being permitted to challenge a redistricting plan pursuant to the VRA. Under Gingles, an "influence district"--a district in which a minority group influences political decisionmaking but is not large enough to constitute a majority--could not exist by definition for the purposes of the VRA, and the plaintiffs here could therefore show no statutorily protected interest in the fourteenth congressional district for the purposes of this action. Compare Armour v. Ohio, 775 F. Supp. 1044, 1050-52 (N.D. Ohio 1991) (holding that the Gingles prerequisites apply only to multi-member districts) and Emison v. Growe, 782 F. Supp. 427, 435-36 (D. Minn. 1992) (same) with Hastert v. State Bd. of Elections, 777 F. Supp. 634, 651-55 (N.D. Ill. 1991) (refusing to recognize minority influence districts for Voting Rights Act purposes) and Illinois Legislative Redistricting Comm'n v. LaPaille, 786 F. Supp. 704, 716 (N.D. Ill. 1992) ("there are serious questions as to whether 'swing' claims are legally cognizable under the Voting Rights Act").

In examining the asserted discriminatory effects anticipated in the fourteenth congressional district, we will assume, arguendo, that a significant reduction of minority political power in an "influence district" is judicially cognizable under § 2 of the Voting Rights Act.

There appears to be no dispute that African-Americans in the old fourteenth congressional district generally voted as a bloc. However, the plaintiffs have presented little probative evidence that the remaining African-Americans in the new fourteenth congressional district, who represent some 18% of the population, will be unable to maintain a similar level of influence on elections under the Pennsylvania Supreme Court's plan.

Plaintiffs presented the testimony of Wendell Freeland, an African-American resident of Pittsburgh and a knowledgeable pundit on the subject of Allegheny County politics. Mr. Freeland testified that African-Americans in the old fourteenth congressional district were forced to forge coalitions with other blocs of voters to elect the representatives of their choice. Mr. Freeland also admitted that the Democratic Congressman presently representing the district, William Coyne, has been reasonably responsive to the needs and concerns of his African-American constituents, and that Congressman Coyne would have little difficulty securing reelection despite the 6% reduction in the African-American population in the fourteenth district. These facts indicate that African-American voters have been able in the

past, and will still be able continue in the future, to combine with like-minded white voters to elect their candidate of choice.[20]

Plaintiffs also argue that African-Americans will have diminished leverage, and thus a diminished voice, in influencing decisions made by the congressman representing the fourteenth congressional district after the election. The court heard testimony from Michelle Agatston, a resident of the community of Wilkinsburg, which abuts the eastern side of the City of Pittsburgh. Under the Pennsylvania Supreme Court plan, Wilkinsburg, which has a African-American majority population, is placed in the eighteenth congressional district along with several of the more affluent suburbs of Pittsburgh. Ms. Agatston testified that Wilkinsburg has much in common with the city and little in common with the well-to-do outlying communities with which it will share a congressman.

While relevant to the problems of Wilkinsburg, Ms. Agatston's testimony was of little probative value with regard to the issue before this court--whether the political voice of African-Americans in the fourteenth congressional district will be

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20. There was also testimony that the new fourteenth will be heavily Democratic, a fact which increases the importance of the Democratic primary. This will magnify the power of African-American voters, who are overwhelmingly Democrats. Moreover, the plaintiffs offered no evidence of bloc voting on the part of white voters which might result in the consistent defeat of African-American candidates of choice. To the contrary, it appears that African-Americans in Allegheny County have been able to elect their candidate of choice in congressional elections with some regularity.

curtailed by the Supreme Court plan. Indeed, Ms. Agatston stated that she was not aware of any concern on the part of African-American voters in the new fourteenth district about a dilution of their political influence on their representative.

Mr. Freeland also did not venture an opinion on the whether the political voice of African-Americans in the fourteenth district has been diminished by the new plan. He did note that African-Americans in the new eighteenth congressional district, comprising only 7% of that district's population, would likely have little influence leverage over their representative, and that the African-American populations in Pittsburgh, Wilkinsburg and the former mill towns lining the Monongahela River have communities of interest not shared by some of the more prosperous outlying suburbs. He did not testify, though, that the failure to join these communities with high concentrations of African-Americans diluted the influence of African-Americans who will be residing in the new 14th.

Plaintiffs also presented testimony from Dr. Brian Sherman, an expert on voting rights matters. Dr. Sherman's testimony focused on the use of "report cards" found in the Almanac of American Politics in an attempt to show that, as the number of African-Americans found in a congressional district dwindles, the responsiveness of the representative to African-Americans decreases in kind. These report cards reflect the ratings assigned to

Congressmen by various interest groups, who judge them according to their voting records on issues of concern to those groups.

Dr. Sherman compared the voting record of Congressman Coyne as rated by ten organizations[21] with that of the retiring representative in the now defunct twentieth congressional district, Joseph Gaydos, and former Congressman William Gray, an African-American who represented the second congressional district of Pennsylvania in Philadelphia until his recent resignation. Approximately 7% of the population in Congressman Gaydos' district was African-American; in Congressman Coyne's district under the 1982 plan, the percentage was just over 23%; the second congressional district, under the 1982 plan, was nearly 85% African-American. Dr. Sherman then compared the three representatives' report cards, using Congressman Gray's ratings as the benchmark for responsiveness to issues important to African-Americans. Congressman Gaydos' rating by the ten groups was off by an average of 24 points from Gray (out of 100); Congressman Coyne missed the Gray mark by an average of 5.9 points. From this comparison, Dr. Sherman concluded that the 25% drop in African-American population in the fourteenth congressional district would diminish minority influence on Congressman Coyne.

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21. Some organizations doing the grading in the Almanac had a generally "liberal" bent, and five had a generally "conservative" focus. For example, two of the "liberal" groups were the American Civil Liberties Union and Americans for Democratic Action, while on the "conservative" side, the Conservative Union and the Chamber of Commerce were represented.

We find Dr. Sherman's analysis to be seriously flawed. First, the voting report card as well as the testimony of Mr. Freeland establish that Congressman Coyne is reasonably responsive to African-American concerns. For the court to conclude that, because the percentage of African-Americans in his district has dropped six points, he will suddenly become deaf to the petitions of those constituents would be pure conjecture. Second, on cross-examination, it was shown that the correlation between African-American population and responsiveness as gauged by the Almanac's report card is not always present. For instance, Barney Frank, a white Congressman from Massachusetts representing a nearly universally white district, possessed a voting record similar to that of Congressman Gray. Conversely, Mike Espy, an African-American Congressman from Mississippi, holds substantially lower grades than either Congressman Gray or Congressman Coyne despite answering to a constituency which is 59% African-American. Id. at 382-83. As a consequence, the court is far from satisfied that, due to the decrease in African-American population in the new fourteenth congressional district, those African-Americans remaining in the district will be denied the degree of influence and access they enjoyed under the 1982 plan.

In conclusion, plaintiffs have presented little evidence that the decrease in African-American population in the fourteenth congressional district under the Pennsylvania Supreme Court plan will result in the loss of African-Americans' ability to elect the

candidates of their choice or even to influence the decision-making of their representative. There was no evidence presented showing historical discrimination against African-Americans in Allegheny County nor was evidence presented of previous racially divisive campaigns. Further, there was no evidence offered establishing the existence of white bloc voting which operated to squeeze out minority candidates. Instead, it appears that African-Americans within the fourteenth congressional district, who would be a relatively small minority (under 25%) in any district configuration, form coalitions with others to ensure that their voices are heard and that their votes count as effectively as is possible given their numbers. With regard to political influence, it is clear that the incumbent in the fourteenth congressional district was and is responsive to the concerns of African-Americans, and there was no evidence tendered which suggests to us that he will not continue this practice. Accordingly, considering totality of circumstances, we conclude that plaintiffs have not shown a violation of the VRA with regard to the fourteenth congressional district.

2. The Second Congressional District

The Pennsylvania Supreme Court plan reduces the percentage of African-Americans in the second congressional district from approximately 81% to 62%; a large portion of that decrease was shifted to the first congressional district, which now

boasts a 52.4% African-American population, thus becoming a new minority majority district. See Mellow v. Mitchell, 607 A.2d 204, 219-20 (Pa. 1992).

The plaintiffs contend that the reduction of the percentage of African-Americans in the second congressional district below 65% causes a dilution of African-American voting strength in violation of § 2 of the VRA. The 65% figure is used by the Department of Justice, civil rights organizations, and many courts as the benchmark for what will constitute a safe district for a minority candidate of choice. See Ketchum v. Byrne, 740 F.2d 1398, 1408 n.7 (7th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). This percentage, higher than a simple majority, is intended to compensate for historically lower voter turnout and registration among minorities in many voting districts and for a generally younger population base.

Plaintiffs, however, ascribe an almost talismanic significance to the 65% marker. Indeed, the simple fact that the minority population has been reduced below the 65% level is essentially the length and breadth of their evidence that African-American voters in the second congressional district are being denied their rights under § 2.

In the absence of evidence, plaintiffs invite us to adopt a burden-shifting procedure similar to that employed in Title VII cases, 42 U.S.C. § 2000e, under the authority of the Supreme Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792,

802 (1973). As contemplated by plaintiffs, once they have made out their prima facie case by demonstrating that the redistricting plan reduces the minority population below 65% in the district, then the burden shifts to those defending the plan to come forward with justifications for the retrogression. In support of this theory, the plaintiffs note that burden shifting has already been employed in the context of a redistricting challenge. As discussed earlier, the Supreme Court in Karcher established the principle that where a challenger to a redistricting plan shows that a lower population deviation between districts could have been achieved, the burden shifts to the drafters of the plan to produce legitimate reasons for the higher deviations. Karcher, 462 U.S. at 730-31.[22]

Plaintiffs argue that a burden-shifting analysis is necessary here because plaintiffs would otherwise be "forced to prove a negative," i.e. that a district with an African-American population below 65% will not have the opportunity to elect the candidates of their choice.

We are unwilling to adopt a burden-shifting approach for § 2 claims for a number of reasons. First, as the court noted above, the 65% figure is not an end in itself but is instead a rough guideline. If we required that the drafters of a plan bear the burden of justifying any proposed retrogression below the 65%

22. Plaintiffs also point out that burden shifting has been used by the courts in cases involving discriminatory jury selection. See Batson v. Kentucky, 476 U.S. 79, 93-94 (1986); Duren v. Missouri, 439 U.S. 357, 368 (1979).

mark, the court would be inscribing that figure in stone, a significance which is not justified by the figure's history, usage, or rational justification. See Harrison v. Pennsylvania Legislative Reapportionment Comm'n, C.A. 92-0603, 1992 U.S. Dist. LEXIS 5315 at *5-6 (E.D. Pa. April 21, 1992) (permitting retrogression under 65% in four Philadelphia state Senate districts); Illinois Legislative Redistricting Comm'n v. LaPaille, 786 F. Supp. 704, 712 n.7 (N.D. Ill. 1992) (expert described 65% figure as a " 'rough rule of thumb' " and noted that the percentage of a majority actually needed varies by area); Martin v. Mabus, 700 F. Supp. 327, 336 (S.D. Miss. 1988) (60% majority district approved); James v. City of Sarasota, 611 F. Supp. 25, 27-28 (M.D. Fla. 1985) (court approved 50.1% African-American population despite the existence of racial bloc voting, due to high African-American voter turnout);[23] Jordan v. Winter, 604 F. Supp. 807, 814

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23. In James, the court quoted in its opinion from a letter sent to it by the Department of Justice. The Department stated that it does not

> "attach particular significance to a 65 percent population figure, and no attempt is made to add arbitrarily increments of five percentage points each to compensate for age, registration and turn-out differences.
>
> Accordingly, the Attorney General has frequently concluded, based on the facts presented in a particular submission, that districts containing less than 65 percent of the total are racially fair districts and that the plan submitted is entitled to Section 5 preclearance."

(continued...)

(N.D. Miss.), aff'd sub nom Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002 (1984) (court rejected plaintiffs' argument that 58.3% African-American district was insufficient to permit African-Americans to elect candidates of their choice). As previously noted, the reason that 65% rather than 50% is used as a rule of thumb to demarcate the lower level of a "safe minority district" is to compensate for any underrepresentation of African-Americans among registered voters or among those persons who actually go to the polls and vote. Where, as in the second congressional district, the percentage of registered African-Americans is equal to or greater than the percentage of registered white voters and the turnout of African-American voters equals or exceeds the turnout of other voters, the justification for strict adherence to the 65% guideline is greatly reduced.

Second, there is no case law which lends support to the adoption of a burden shifting procedure in § 2 cases, a fact to which counsel for the plaintiffs admitted at trial. Third, plaintiffs cite no authority within the VRA itself or its legislative history that Congress had contemplated a set of shifting burdens. In fact, the statute indicates otherwise, as § 5 of the VRA provides that certain jurisdictions (of which Pennsylvania is not one) must demonstrate to the Department of

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23. (...continued)

James, 611 F. Supp. at 32-33.

Justice or to a District of Columbia district court that changes in their voting laws do not have a discriminatory purpose or effect. See 42 U.S.C. § 1973c; Georgia v. United States, 411 U.S. 526, 538 (1973); South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966). Certainly, if Congress had in mind a system such as that contended for by plaintiffs, it would have moved the burden to all states, not just a selected number.

Beyond their arguments regarding the propriety of shifting the burden of proof in the present case, the plaintiffs have presented little evidence which would tend prove the existence of any of the factors listed in Senate Report 97-417. There is no indication before this court of racially biased elections, white bloc voting, historical discrimination, or the existence of election procedures or devices intended to disenfranchise African-Americans in Philadelphia.

In fact, the vast majority of the evidence presented at trial pointed in the opposite direction, that is, that the African American populace in Philadelphia is an effective force at the polling place and that a 65% super majority in any one district is not necessary to ensure that they continue to be able to elect representatives of their choice. Defendants presented the expert testimony of Dr. Lisa Handley, who used both homogeneous precinct analysis (also referred to as "extreme case analysis") and bivariate ecological regression analysis to determine how the

Pennsylvania Supreme Court's plan would affect minorities' ability to elect the candidates of their choice in the second district.[24]

Dr. Handley testified that African-Americans appear to be registering to vote in higher numbers than whites in Philadelphia. She also concluded that African-Americans in the city participate in general elections at approximately the same rate as whites, and actually turn out for the Democratic primaries in greater numbers than whites. Dr. Handley also performed a racial bloc voting analysis, in which homogeneous precinct and bivariate techniques indicated that African-American candidates could look to cohesive support from African-American voters, and that they might expect a portion of white crossover votes as well. Last, defendants' expert examined "recompiled election returns," which involved looking at election returns in precincts which make up the new second congressional district for particular races over the past 10 years or so. From the various returns, she extrapolated that in nearly every case, the candidate preferred by African-Americans would have won in that district. From her study, Dr. Handley concluded that African-Americans would have an equal opportunity to elect the candidates of their choice in the reconfigured second congressional district.

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24. Testimony at trial established that these techniques are, although not foolproof, generally recognized as effective tools for gauging minority strength at the polls. Trial Tr. at 478-79. Even plaintiffs' expert stated that he was aware that regression analysis had been accepted in many Voting Rights Act cases. Trial Tr. at 635.

The plaintiffs attacked Dr. Handley's analysis for leaving out two elections involving African-American candidates, the 1985 elections for District Attorney, where a white Republican defeated an African-American Democrat, and the 1984 presidential primary, where Jesse Jackson defeated Walter Mondale by only 12,000 votes (according to plaintiffs, Rev. Jackson garnered nowhere near a majority of the participating democratic voters in Philadelphia). We are reasonably satisfied, however, that Dr. Handley's conclusions are sound. She has employed techniques which are generally recognized as valid in voting rights cases. The raw data that the court has seen would seem to support her conclusions. The fact that she failed to examine two other races, while perhaps sufficient to undercut the weight of her testimony, is certainly not sufficient to sink it entirely.

Moreover, Dr. Handley's judgments are bolstered by anecdotal testimony provided by two African-American state representatives with extensive experience in Philadelphia politics, Harold James and Vincent Hughes. Both gentlemen testified that African-Americans have a substantial voice in electing candidates of their choice in Philadelphia and that they would continue to have that voice in the new second congressional district. Id. at 532, 543. In addition, we note that, not inconsequentially, the incumbent African-American Congressman representing the second congressional district, Lucien Blackwell, won the April 28th

Democratic primary under the district lines drawn by the Pennsylvania Supreme Court plan.

We also find it telling that, as a matter of measuring support for the plan in the affected communities among African-Americans, several African-American political groups from Philadelphia have thrown their support behind the Pennsylvania Supreme Court plan, including intervenors the Frederick Douglass Society and the Philadelphia Leadership Conference.

Last, in April of this year, a court within the Eastern District of Pennsylvania had an opportunity to examine Philadelphia's racial make-up and its impact on voting. That court rejected the contention that 65% super majority districts are necessary to ensure compliance with the VRA for state Senate elections. In Harrison v. Pennsylvania Legislative Reapportionment Commission, C.A. 92-0603, 1992 U.S. Dist. LEXIS 5315 (E.D. Pa. April 21, 1992), the plaintiffs challenged a state senate reapportionment plan which decreased the African-American populations in four Philadelphia districts below the 65% guideline[25] following the addition of a new district to the city.

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25. Some of the drops in minority population were precipitated by the addition of the new district. In one district, the percentage fell from 93% minority (85.3% African-American) to 65.6% (60.6% African-American); in a second the total minority population had 71.3% (70% African-American) under the old plan, while under the new it was 62.6% (61.5% African-American). Harrison, 1992 U.S. Dist. LEXIS 5315, at *2-3.

After considering the expert testimony provided by the defendants, the Harrison court concluded that:

> the percentage of African-Americans is sufficient to assure that they can both nominate and elect candidates of their choice. Indeed, the testimony of plaintiffs' expert, when properly examined, leads to essentially the same conclusion. Based upon statistical analyses of past elections in the same geographical area covered by the four new districts now under challenge, the defense expert demonstrated, inter alia, that African-American voters tend to vote for African-American candidates, and that there is a substantial crossover voting by white voters for African-American candidates, with the result that African-American voters are not prevented, by white bloc voting, from electing the candidates of their choice.

Harrison, 1992 U.S. Dist. LEXIS 5315, at *6-7.

Looking at the totality of the circumstances, we are confident that the retrogression of the percentage of African Americans living in the second congressional district to under 65% will not harm the ability of African-Americans within that district to elect the candidate of their choice. Accordingly, we will rule against the plaintiffs on their VRA § 2 claim with regard to the second congressional district.

B. The Fifteenth Amendment Claim

The fifteenth amendment prohibits discrimination against persons in matters of voting based on race or color. City of Mobile v. Bolden, 446 U.S. 55, 61-62 (1980); Beer v. United States, 425 U.S. 130, 142 n.14 (1976) (noting that the Supreme Court has

never found a redistricting plan invalid under the fifteenth amendment). To be successful, a claimant under the amendment must show 1) that some type of racially discriminatory motivation was involved in the imposition of the election-related procedure or regulation and 2) that the procedure or regulation results in the denial or abridgment of the right to vote. Id. at 62-63.

Plaintiffs' fifteenth amendment claim is based on the alleged retrogression in the "influence" of African-Americans in the fourteenth congressional district. As we already noted, plaintiffs allege that the drafters of the plan adopted by the Pennsylvania Supreme Court intended to gerrymander the eighteenth congressional district so that the incumbent freshman Republican Congressman would be placed into a heavily Democratic district. To achieve that end, plaintiffs contend, the drafters decided to pull out some of the African-American voters from the fourteenth congressional district and place them in the eighteenth, thereby decreasing the African-American population in the fourteenth.

We have already held in the context of plaintiffs' VRA claim that plaintiffs have shown no intentional discrimination and, further, have shown no dilution of the ability of African American voters in the fourteenth congressional district to influence elections or to have their voices heard by their Congressman. Accordingly, we will enter judgment in defendant's favor on the fifteenth amendment claim.

V.

We thus reject each of the plaintiffs' challenges to the redistricting plan adopted by the Supreme Court of Pennsylvania.[26] We will dismiss the claims of plaintiffs Ryan, Loeper and Fisher. With respect to all other plaintiffs, judgment will be entered for the defendants.

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26. To the extent plaintiffs challenge the constitutionality of the redistricting plan adopted by the legislature in 1982, their claims were rendered moot when the Supreme Court of Pennsylvania found that plan to be unconstitutional and enjoined its enforcement. Accordingly, we will dismiss those claims. We will also deny defendants' outstanding motions to dismiss for lack of standing. While not every plaintiff has standing to press all of the claims asserted by plaintiffs, there is at least one plaintiff with standing to press each claim so asserted. See Spector v. Garrett, 1992 U.S. App. LEXIS 6969 at *15 (3d Cir. Apr. 17, 1992); City of Los Angeles v. National Highway Traffic Safety Admin., 912 F.2d 478, 485 (D.C. Cir. 1990).

(15)

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

CHESTER NERCH, HERBERT BARNESS, CLARENCE THOMPSON, JOSE HERNANDEZ, MATTHEW RYAN, F. JOSEPH LOEPER, D. MICHAEL FISHER, MICHELLE AGATSTON, LUIS CRUZ and LAWRENCE R. WATSON, II,

Plaintiffs,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth of Pennsylvania, and WILLIAM BOEHM, as Commissioner of the Bureau of Commissions, Elections and Legislation, Department of State of the Commonwealth of Pennsylvania,

Defendants.

Civil Action No. 3:CV-92-0095

Certified from the record
Date 8/13/92
Lance S. Wilson, Clerk
By

FINAL ORDER AND JUDGMENT

This 13 day of August, 1992, IT IS ORDERED that:

1. The claims of plaintiffs Ryan, Loeper and Fisher are dismissed for want of jurisdiction.

FILED
HARRISBURG PA
AUG 19 1992
LANCE S. WILSON, CLERK
PER
DEPUTY CLERK

AO 72A
(Rev. 8/82)

2. With respect to the other plaintiffs:

(a) Their claims seeking relief with respect to the 1982 redistricting plan are dismissed as moot, and

(b) Judgment is hereby entered for the defendants on the remaining claims.

SYLVIA H. RAMBO
United States District Judg

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

RICHARD VIETH, NORMA JEAN VIETH et al Plaintiffs,	:	
v.	:	No. 1: CV 01-2439 Judge Nygaard, Judge Rambo
THE COMMONWEALTH OF PENNSYLVANIA, et al Defendants.	:	Judge Yohn

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2002, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record by fax transmission and first class mail, postage prepaid:

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