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

RICHARD VIETH, et al,  
Plaintiffs, :  
:  
v. :  
THE COMMONWEALTH OF :  
PENNSYLVANIA, et al., :  
Defendants. :

No. 1:CV-01-2439  
(Judge Rambo)

**MEMORANDUM OF LAW IN SUPPORT OF MOTION  
TO CONDUCT LIMITED DISCOVERY**

**BACKGROUND**

On April 8, 2002, this Court declared the congressional redistricting plan for the Commonwealth of Pennsylvania contained in Act No. 2002-1 ("Act 1") unconstitutional under the principle of one-person, one-vote, enjoined its implementation, and directed the Pennsylvania General Assembly to "within three weeks of the date of this order, prepare, enact and submit for review and final approval by this Court, a congressional redistricting plan in conformity with this opinion."

Subsequently, the General Assembly, on April 17, 2002, passed a bill (HB 2545, PN 3726) containing a revised congressional redistricting plan. On April 18, 2002, Governor Schweiker signed the bill into law as Act No. 2002-34 ("Act 34").

Act 34 also repeals Act 1. Defendants Jubelirer and Ryan, joined by Executive Officers, immediately notified this Court of the enactment of Act 34.

On April 22, 2002, Plaintiffs moved for the commencement of remedial hearings ("Remedial Motion"). Plaintiffs' Remedial Motion attacked the validity of the Act 34 plan on the grounds that it, like Act 1, violates the one-person, one-vote principle. Plaintiffs alleged that, due to a change of a voting precinct boundary in Armstrong County's South Buffalo Township, there is a 97-person deviation in Act 34 because that voting precinct boundary also forms part of the boundary between the 3<sup>rd</sup> and 12<sup>th</sup> congressional districts in the Act 34 plan (as it did in the Act 1 plan). The change was precipitated by a petition filed on February 19, 2002 by the Board of Elections of Armstrong County ("Board of Elections") that was approved by the Court of Common Pleas of Armstrong County ("Armstrong County Court") on March 15, 2002 ("March 15<sup>th</sup> order").

In support of their allegation that the Act 34 plan violated the one-person, one-vote principle, Plaintiffs attached the affidavit of Robert L. Priest, the Technical Director of the Office of Demographic Analysis for the Democratic Caucus of the Pennsylvania House of Representatives to their Remedial Motion. Mr. Priest declared, *inter alia*, that Act 34, by virtue of the Armstrong County Court's March 15<sup>th</sup> order, had a population deviation of 97.

On April 23, 2002, this Court set a hearing for May 8, 2002 "for the purpose of determining whether Act 34 suitably remedies the constitutional violation found by this court in its order of April 8, 2002." On May 2, 2002, however, following a conference call with counsel, this Court canceled the hearing and instructed Defendants to file a Status Report on the dispute caused by the Armstrong County Court's March 15<sup>th</sup> order.

Defendants filed status reports on June 3, 2002, specifically noting that the Board of Elections had petitioned the Armstrong County Court to vacate the March

15<sup>th</sup> order. This Court, on June 19, 2002, ordered Defendants to file another Status Report on August 19, 2002. Defendants submitted their second status reports, noting, *inter alia*, that on July 29, 2002, the Armstrong County Court (Nickleach, P.J.) had denied the Board of Elections' petition to vacate the March 15<sup>th</sup> order. Defendants also presented argument as to why the Armstrong County situation did not affect the constitutionality of Act 34.

This Court, by order dated September 13, 2002, scheduled a hearing regarding the constitutionality of Act 34 for October 15, 2002. The Court also instructed the parties that, if they wished to present evidence at the hearing, a written request detailing the evidence and the reasons for its presentation should be filed no later than October 5, 2002.

#### **ARGUMENT**

Defendants Jubelirer and Ryan seek limited discovery in advance of the hearing for the purpose of deposing Mr. Priest. Mr. Priest (who testified at trial on behalf of the Plaintiffs in the trial concerning the Act 1 plan) provided the affidavit that Plaintiffs submitted to support their allegation that the Act 34 plan has a 97-person population deviation. Defendants Jubelirer and Ryan seek to depose Mr. Priest in connection with the averments in his affidavit and to review any documents in his possession that relate to his averments.

This discovery, which, due to time constraints and the narrow scope of the legal inquiry (whether Act 34 violates the one-person, one-vote principle), would of necessity be very limited and need to be done soon. Defendants must prepare their case and decide what, if any, evidence they need to request this Court (by October 5, 2002) for leave to present at the October 15, 2002 hearing.

Depending on what the deposition reveals, Defendants may or may not stipulate to portions of Mr. Priest's affidavit. The deposition will also help

Defendants to decide whether to seek to call any witnesses at the hearing. Because Mr. Priest asserts that he has knowledge related to the subject of the hearing, Plaintiffs may seek to call him as a witness. If Plaintiffs ask permission to call Mr. Priest as a witness at the hearing, Defendants would be at a tactical disadvantage during cross-examination because they would be unable to predict his testimony. On the other hand, Mr. Priest may have knowledge that is helpful to the defense of the Act 34 plan and that was excluded from his affidavit. If his deposition discloses information unfavorable to the Plaintiffs, Defendants may wish to call him as a witness or to use his deposition transcript. Only by exploring the underpinnings of the affidavit in advance can Defendants know if Mr. Priest has any knowledge not set forth in his affidavit that would have bearing on the hearing.

The Federal Rules of Civil Procedure recognize that the discovery process plays a vital role in trial preparation, *Hickman v. Taylor*, 329 U.S. 495 (1947), by exposing the disputed facts and allowing for a fairer contest. *See United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958).<sup>1</sup> As it did in conjunction with the hearing on Act 1 plan, the Court should permit limited discovery to protect Defendants' right to a fair hearing.

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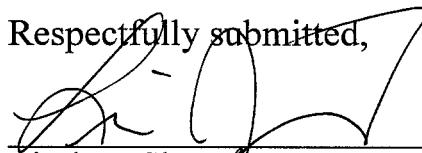
<sup>1</sup> Fed.R.Civ.P. 56(f) is based on the principle that it is often proper to permit discovery before entering summary judgment on the basis of affidavits. *See also In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 739 (3d Cir. 1994) (expressing preference, for fairness reasons, that party be permitted to depose experts whose affidavits provide basis for *in limine* hearing on *Daubert* evidence despite the close of discovery). Expedited discovery schedules are also often entered in advance of hearings held on preliminary injunction requests. *See e.g., New Dana Perfume Corp. v. The Disney Store, Inc.*, 31 F. Supp. 616 (M.D. Pa. 2001) (noting that expedited discovery was conducted in advance of PI hearing); *Moscony v. Quaker Farms, LP*, 2000 U.S. Dist. LEXIS 17772 \*9 (E.D. Pa. 2000) ("Some discovery in connection with a preliminary injunction request is also generally appropriate") (citing *Ellsworth Assoc. v. United States*, 917 F.Supp. 841, 844 (D.D.C. 1996)).

## CONCLUSION

For the reasons given above, this Court should grant Defendants Jubelirer and Ryan's Motion to Conduct Limited Discovery and permit Defendants to depose Robert L. Priest and review any documents on which he relied in preparing his affidavit, on or before September 30, 2002.

September 17, 2002

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that on September 17, 2002, I caused a copy of the foregoing Memorandum of Law in Support of Motion to Conduct Limited Discovery to be served on the following as indicated:

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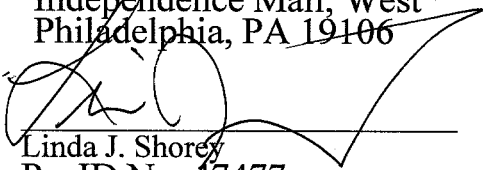
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