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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH, *et al.*, Plaintiffs, v. COMMONWEALTH OF PENNSYLVANIA, *et al.*, Defendants. ROBERT J. MELLOW, Senator, 22nd District, *Amicus Curiae.*	Civil No. 1:CV-01-2439

MEMORANDUM OF *AMICUS CURIAE*
SENATOR ROBERT J. MELLOW IN OPPOSITION TO
PRESIDING OFFICERS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Presiding Officers have moved for summary judgment, contending that there are no genuine issues of material fact and that they are entitled to judgment as

a matter of law. The Executive Officers have joined this motion. The motion is without merit, and should be denied.

First, the Presiding Officers have failed to carry their burden of demonstrating the absence of genuine issues of material fact. In accordance with Local Rule 56.1, which requires "a concise statement of the material facts, in numbered paragraphs, as to which the moving party contends there is no genuine issue to be tried," the Presiding Officers have submitted a Statement of Material Facts. The Presiding Officers' statement, however, contains numerous "facts" that the Presiding Officers ask this Court to infer from other facts. For example, the Presiding Officers assert that the March 15, 2002, order of the Armstrong County Court of Common Pleas, which forms the basis for the argument that Act 34 has a deviation of 97 people, "was null and void because the Armstrong County Court, at the time it did so, lacked authority to change an election district boundary." Presiding Officers' Statement of Material Facts in Support of Motion for Summary Judgment ¶ 31. In support of this "fact," the Presiding Officer cite only an "[i]nference" they ask this Court to draw from other facts. *Id.* It is hornbook law, however, that on a motion for summary judgment, the moving party is not entitled to the benefit of such inferences. For this reason alone, the motion should be denied.

Second, even assuming *arguendo* that there were no disputed issues of material fact, the Presiding Officers have failed to demonstrate their entitlement to judgment as a matter of law. Notwithstanding their repeated efforts to overturn the Armstrong County Court's decision expressly or implicitly, the Presiding Officers

still cannot avoid the effect of that decision on the deviation in Act 34. In the present motion, the Presiding Officers rely principally on a new statute, Act 150 of 2002, which they claim moots this case because it directs local election officials to administer congressional elections using the precinct boundaries on which the Legislative Data Processing Center based its population data. This statute, although couched in prospective terms, would interfere with the final judgment of the Armstrong County Court by directing local election officials to ignore the fact that the judgment changed those boundaries. Under well-established Pennsylvania case law regarding separation of powers, however, the General Assembly cannot do so. For this reason as well, the motion should be denied.

II. STATEMENT OF FACTS

A. THE PASSAGE OF ACT 34

Act 34 of 2002, the redistricting plan at issue, was passed by the General Assembly and signed by the Governor in April 2002, after this Court invalidated the prior congressional redistricting plan (Act 1 of 2002) on the ground that it violated the "one person, one vote" rule. Like Act 1, Act 34 is a partisan gerrymander designed to maximize the number of Republicans elected to Congress. *See Vieth v. Commonwealth,* 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002) (discussing likely partisan effect of Act 1).

B. THE ARMSTRONG COUNTY LITIGATION AND ITS EFFECT ON ACT 34

Act 34 has a deviation of 97 people. The reason for this deviation is that, on March 15, 2002, between the passage of Act 1 and the passage of Act 34, the

Armstrong County Court of Common Pleas issued an order that changed the border between two election districts (*i.e.,* precincts) in South Buffalo Township. *See* Presiding Officers' Appendix to Statement of Material Facts ("Appendix"), Tab L, Ex. 4. The Armstrong County Board of Elections (the "Board") petitioned the Armstrong County Court for this change in order to place the Northpointe Industrial Park (which under Act 1 straddled the boundary between Congressional District 3 and Congressional District 12) entirely within Congressional District 12. *See id.*, Tab L, Ex. 1; *id.* Tab N, ¶¶ 29, 31. The Board sought this change because Congressman John Murtha, who represents Congressional District 12, had been instrumental in obtaining federal grants for the development of Northpointe. *See id.*, Tab O. On March 15, 2002, the Armstrong County Court granted the Board's petition and changed the border between the two precincts. *Id.* Tab L, Ex. 4. No appeal was taken from this order.

This change had the effect of moving 49 people from one precinct to the other. This change would not have affected the deviation of Act 34 except for the fact that Act 34 splits South Buffalo Township and places one of these precincts in Congressional District 3 and the other in Congressional District 12. Had the population of these precincts been what it was prior to the action of the Armstrong County Court of Common Pleas, Congressional District 3 in Act 34 would have had 646,372 people, a deviation of 1 person, and Congressional District 12 would have had 646,371, the ideal population. Because of the boundary change, however, the population of Congressional District 3 in Act 34 actually is 646,323 (48 fewer people than the ideal) and the population of Congressional District 12 is

646,420 (49 more people than the ideal). Thus, far from having a deviation of 1 person, Act 34 actually has a deviation of 97 people. *See* Declaration of Robert L. Priest (attached to Plaintiffs' Motion to Impose Remedial Districts at 6-9 (filed April 22, 2002).

C. EFFORTS TO OVERTURN THE ARMSTRONG COUNTY COURT'S DECISION

Since the Armstrong County Court issued its order changing the boundary between the two precincts, Defendants have orchestrated a series of maneuvers in an effort to overturn that decision. Thus far, each of these maneuvers has proved unsuccessful.

1. The Board's Petition to the Armstrong County Court to Overturn Its Decision

The Presiding Officers assert that, upon learning of the boundary change, the Secretary of the Commonwealth told that Board that it lacked the authority to seek the boundary change and that, in any event, it could not effect a change in the boundary between two congressional districts. *See* Appendix, Tab N, ¶ 37. The Board subsequently reversed course and petitioned the Armstrong County Court to vacate its decision. *See id.*, Tab L, Ex. 5.

2. The General Assembly's Amendment to Section 536 of the Election Code

The Presiding Officers also sought to reverse the Armstrong County Court's decision legislatively by amending § 536 of the Pennsylvania Election Code, 25 P.S. § 2746. *See id.*, Tabs Q, R. Prior to the amendment, § 536 provided that there shall be no power to *establish, abolish, divide or consolidate* an election

district during the period June 1, 2000, through April 30, 2002" (emphasis added). Apparently concerned that the Armstrong County Court had neither created ("establish[ed]") any new election districts, nor destroyed ("abolish[ed]"), split ("divide[d]"), or combined ("consolidate[d]") any existing election districts, the General Assembly amended the statute to prohibit the "alter[ation] in any manner" of an election district during a prescribed period. 2002 Pa. Legis. Serv. Act 2002-44 (S.B. 1240) (Purdon's) (available on Westlaw). The amendment to § 2746 purported to apply retroactively to November 24, 1999 – prior to the time the Armstrong County Court issued its order. *See* 2002 Pa. Legis. Serv. Act 2002-44, § 5.

3. The Armstrong County Court's Denial of the Board's Petition

On July 29, the Armstrong County court issued an order (Appendix, Tab L, Ex. 7) denying the Board's petition to vacate the March 15 decision. In an accompanying opinion, the court stated,

> [I]t appears that in reaction to this Court's Order of March 15, 2002, and in an attempt to overrule its decision, the legislature hastily passed an amendment to § 536, outlawing *alteration* of election districts during the freeze period in addition to prohibiting the establishment, abolition, division, or consolidation of election districts.

Id. at 3.

The court concluded, however, that "our decision [of March 15] cannot be overruled by the legislature." *Id.* at 4. The court explained that, by the time the General Assembly passed the amendment on May 16, 2002, "the matter involving South Buffalo's voting district was already completed . . . . No appeal had been

taken from the Order of March 15, 2002. Nothing remained pending, and the case was over." *Id.* The court further explained that,

> "[t]hough the legislature possesses the power to promulgate the substantive law, [footnote omitted] judicial judgments and decrees entered pursuant to these laws may not be affected by subsequent legislative changes after those judgments and decrees have become final."

Id. at 5 (quoting *Commonwealth v. Sutley,* 474 Pa. 256, 378 A.2d 780, 784 (1977)).

Having determined that the amendment to § 536 could not be applied retroactively, the court went on to hold that, as worded prior to the amendment, the statute did not prohibit the alteration of the boundary between the two precincts. The court reasoned that, prior to the amendment, the statute "prohibited establishment, abolition, division, or consolidation of election districts during a freeze period from June 1, 2000 through April 30, 2002. The section said nothing about alteration of election districts. The prohibitions of § 536 are not ambiguous. They clearly do not include the term 'alteration.'" *Id.* at 5. The court went on to state that "the legislature's amendatory language of May 16, 2002 clearly evinces the notion that alteration of existing boundaries was not included in the terms 'establish, abolish, divide, or consolidate' as used in the previous version of § 536 of the Election Code." *Id.* at 6. The court thus concluded that its action in altering the boundaries of the two election districts complied with then-existing law. *Id.* at 6-7.

No party appealed from the Armstrong County court's July 29 order. Rather, as the Presiding Officers concede, "The time for appeal has run and none was taken." Presiding Officers' Second Status Report at 3 (filed Aug. 19, 2002).

4. The Passage of Act 150 of 2002

In its latest effort to nullify the action of the Armstrong County Court, the General Assembly in December 2002 passed Act 150 (Appendix, Tabs S, T), which the Presiding Officers contend disposes of this case. Act 150 provides in relevant part as follows:

> In administering elections for the . . . United States House of Representatives . . ., county boards of election shall adhere to the following rule: Where an election district is used in . . . a congressional redistricting statute . . . to define the boundary of a congressional district . . ., the boundary of such election district shall be the boundary existing and recognized by the Legislative Reapportionment Commission for the adoption of its final plan [for state legislative districts]. The boundaries of the Congressional districts, as established by statute, . . . shall remain in full force and effect for use thereafter until the next reapportionment or redistricting as required by law and shall not be deemed to be affected by any action taken pursuant to this article.

As we demonstrate below, this Act violates Pennsylvania's doctrine of separation of powers by effectively altering the judgment of the Armstrong County Court.

III. ARGUMENT

A. THE PRESIDING OFFICERS HAVE FAILED TO SATISFY THEIR BURDEN OF DEMONSTRATING THE ABSENCE OF A GENUINE ISSUE OF MATERIAL FACT

As the Court knows, "Summary judgment is appropriate only when it is demonstrated that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Troy Chemical Corp. v. Teamsters Union Local No. 408,* 37 F.3d 123, 125-126 (3d Cir. 1994). The moving party bears the burden of establishing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *See United States ex rel.*

Pneumatic & Elec. Equipment Co. v. Continental Ins. Co., 44 F.R.D. 354, 355 (E.D. Pa. 1968); *United States v. Pesses*, 1996 WL 143875 (W.D. Pa. 1996).

"[D]rawing inferences favorable to the moving party . . . is forbidden in ruling on motions for summary judgment." *Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781 (3d Cir. 1978). Consequently, "the moving party is not entitled to the benefit of any inferences to be drawn from his moving papers. Instead the matters presented in connection with the motion must be construed most favorably to the party opposing the motion." *Pneumatic & Elec. Equipment Co.*, 44 F.R.D. at 355; *see also Blewitt v. Man Roland, Inc.* 168 F. Supp. 2d 466, 468 (E.D. Pa. 2001).

Pursuant to Local Rule 56.1, defendants have submitted a Statement of Material Facts in Support of Motion for Summary Judgment (the "Statement"). The Statement includes numerous assertions of "fact" that are not simply material, but actually crucial to the outcome of the motion. In particular, in paragraph 25, the Presiding Officers state: "The Armstrong County Board of Elections had no authority, at that time, to seek a change to any election district boundary, *see* P.S. § 2746, and had no authority, at any time to change a Congressional district boundary. *See* U.S. Const., art I, § 4." Senator Mellow vigorously disputes this purported "fact"; indeed, as the Armstrong County Court properly concluded, the Board, in fact, did have such authority.

Moreover, the Statement asserts numerous alleged "material facts" that the Presiding Officers would have the Court draw by "inference" from other paragraphs in the Statement:

> 31. The March 15, 2002 order was null and void because the Armstrong County Court, at the time it did so, lacked authority to change an election district boundary. Inference from Fact Nos. 23, 25 & 26.
>
> . . .
>
> 43. The March 15, 2002 [order] was not an adjudication. Inference from Fact Nos. 23, 24, 25, 26, 30, 38.
>
> . . .
>
> 45. The March 15, 2002 order approving the change to the boundary between the two election districts in South Buffalo Township did not change the boundary between the 3rd and 12th Congressional Districts established by the Act 1 and Act 34 plan based on the LDP data. Inference from above facts.
>
> . . .
>
> 51. The Act 34 plan, as it is required to be administered, has a "zero" deviation, with 5 districts with a population of 646,371 and 14 districts with a population of 646,372. Inference from above facts.

Under *Drexel,* however, a court may not draw inferences favorable to the moving party in ruling on a motion for summary judgment. Thus, the Presiding Officers have failed to demonstrate the absence of a genuine issue of material fact. For this reason alone, their motion should be denied.

B. THE PRESIDING OFFICERS HAVE FAILED TO SATISFY THEIR BURDEN OF DEMONSTRATING THEIR ENTITLEMENT TO JUDGMENT AS A MATTER OF LAW

The Armstrong County Court's March 15 order disposed of all claims for all parties, and was thus a final order. *See* Pa. R.A.P. 341(b) ("A final order is any order that: (1) disposes of all claims and of all parties. . . ."). No appeal was taken from the March 15 order, and it therefore became a final judgment on April 15, 2002. *See* 42 Pa. C.S. § 5505 (court "may modify or rescind any order within 30

days after its entry . . . if no appeal from such order has been taken or allowed"); Pa. R.A.P. 903(a) (notice of appeal "shall be filed within 30 days after the entry of the order from which the appeal is taken").

Because the Armstrong County court's decision was a final judgment, the General Assembly cannot overturn it by passing a statute that has the effect of negating the judgment. For over 150 years, Pennsylvania courts consistently have held that legislative attempts to overturn final judicial decisions violate the Pennsylvania Constitution's requirement of separation of powers. *See, e.g.*, *Greenough v. Greenough*, 11 Pa. 489, 1849 WL 5732 *5 (1849) (legislature "cannot exercise any part of" the judicial power); *Titusville Iron-Works v. Keystone Oil Co.*, 122 Pa. 627, 15 A. 917 (1888) ("The legislature can no more exercise judicial powers than the courts can arrogate to themselves legislative powers."); *Commonwealth v. Shaffer*, 557 Pa. 453, 459, 734 A.2d 840, 843 (1999) (citing *Greenough* for the proposition that "the legislature cannot, by an act of assembly, overrule a judicial decision"). It has "long been established" in Pennsylvania that "final judgments of the judicial branch are *not to be interfered with* by legislative fiat." *Commonwealth v. Sutley*, 474 Pa. 256, 263, 378 A.2d 780, 783 (1977) (emphasis added). Indeed,

> "[i]t is elementary that the legislature may not, under the guise of an act affecting remedies, destroy or *impair final judgments* obtained before the passage of the act, and this principle prohibits not only a statutory re-opening of cases previously decided by the court but also legislation *affecting the inherent attributes of judgments* . . . ."

Id. at 263, 378 A.2d at 783-784 (emphasis added) (citation omitted). "Thus, it is clearly established in this jurisdiction that . . . judicial judgments and decrees – may not be *affected* by subsequent legislative changes after those judgments and decrees have become final." *Id.* at 784 (emphasis added); *see also*, *First National Bank of Fredericksburg v. Commonwealth*, 520 A.2d 895, 899 (Comm. Ct. 1987) ("[T]he legislature may not interfere with a judicial decision after judgment has been reached, nor may the legislature pass a law which negates the effect of a court decision in which the court has invalidated a previous legislative act."). Moreover, even a statute that is prospective in nature cannot be applied in a manner that will affect judicial decrees and judgments that have become final prior to the enactment of the statute. *See Commonwealth v. Shaffer*, 557 Pa. 453, 734 A.2d 840 (1999) (lower court erred in treating prior judicial decision as a nullity based on legislature's subsequent amendment of statute).

In *Greenough*, the trial court had invalidated a will because the testator's signature had not been witnessed properly. 1849 WL 5732 at *5. Subsequently, the legislature amended the statute regarding wills to validate the will at issue. *See id.* The Pennsylvania Supreme Court concluded that the retroactive application of the statute violated the Pennsylvania Constitution by encroaching upon the judicial function. *See id.* at *5-6.

Forty years after *Greenough*, in *Titusville Iron-Works*, the Pennsylvania Supreme Court again spoke on the impermissibility of legislation that impinges upon judicial authority. That case dealt with an "expository statute, . . . directing the courts what construction be given to previous legislation," *Titusville Iron-*

Works, 122 Pa. at 633, concerning what classes of workmen could obtain mechanics' liens on property on which they had worked. The court declared the statute an unconstitutional exercise of judicial power by the legislature, and explained that the statute was "in no respect a legislative declaration of the rights and privileges of the class of persons to whom it relates but it is a judicial order or decree directed to the courts." *Id.*

More recently, in *Sutley*, the Pennsylvania Supreme Court re-affirmed that the General Assembly cannot pass legislation that has the effect of overturning prior judicial decisions. Appellants were two individuals who had been convicted of possession of marijuana. *See* 378 A.2d at 781. After their convictions the Pennsylvania General Assembly enacted a law that changed the classification of this offense from a felony to a misdemeanor that carried a lesser sentence. *Id.* Subsequently, the General Assembly amended the law to provide for the reduction of sentences for those convicted when marijuana possession was classified as a felony. *Id.* Relying on "the inviolability of final judgments," *id.* at 784, the Court held that the amendment reducing prior sentences was "*in operation and effect*, a legislative command to the courts *to open judgments previously final* and to substitute for that judgment a disposition of the matter in accordance with the subsequently expressed legislative will." *Id.* at 782 (emphasis added).

First National Bank of Fredericksburg v. Commonwealth, 520 A.2d 895 (Comm. Ct. 1987), also involved an attempt by the General Assembly to circumvent a final judicial decision. The case involved an excise tax on banks that was computed in part on the basis of equity capital that included certain obligations

of the United States. *Id.* at 895-96. In *Dale National Bank v. Commonwealth*, 465 A.2d 965 (Pa. 1983), the Pennsylvania Supreme Court held that a similar state tax violated the principle that states may not impose a tax on federal obligations. *First National Bank of Fredericksburg*, 520 A.2d at 895-96. The General Assembly then enacted a new tax to recover revenues lost because of the *Dale National Bank* decision. *Id.* at 896. The First National Bank of Fredericksburg challenged its tax assessments under the new law. *Id.* at 895.

The Pennsylvania Commonwealth Court upheld the challenge, stating that the new tax "infringed upon the power of the judiciary to curtail the operation of state law . . . . Although the legislature did not in this case blatantly try to overrule a judicial decision, . . . the legislature cannot impair the inherent attributes of judgments." *Id.* at 899. Moreover, the court held that "the legislature may not interfere with a judicial decision after judgment has been reached, nor may the legislature pass a law which negates the effect of a court decision in which the court has invalidated a previous legislative act." *Id.* at 899.

Act 150 directs the Board, in administering elections for Congress, to use the pre-March 15, 2002 boundary between the Eastern and Western Precincts in South Buffalo Township. Although Act 150 does not contain express language regarding retroactivity, it is, "in operation and effect, a legislative command" to open the final judgment of the Armstrong County Court and "to substitute for that judgment a disposition of the matter in accordance with the subsequently expressed legislative will" by restoring the boundary between the two precincts to its pre-March 15, 2002 location. *See Sutley,* 378 A.2d at 782. Even if one assumes that,

as in *First National Bank of Fredericksburg*, the General Assembly "did not in this case blatantly try to overrule [the Armstrong County Court's] decision," 520 A.2d at 899, Act 150 nonetheless violates Pennsylvania's separation of powers doctrine because the statute "impair[s] the inherent attributes of [the Armstrong County Court's March 15, 2002] judgment," *id.*, by nullifying its effect on congressional redistricting.

Indeed, Act 150 represents the Commonwealth's third attempt to impair the judgment of the Armstrong County Court. As discussed above, after that court's decision moving the boundary between the two precincts, the Secretary of the Commonwealth apparently convinced the Board to ask the court to vacate its order. The General Assembly went so far as to amend § 536 in an effort to force the Armstrong County Court to restore the boundary between the two precincts to its prior location. The Armstrong County Court, however, correctly ruled that its March 15, 2002 decision could not be re-opened and the amendment to § 536 could not affect this decision.

Act 150 is simply another impermissible attempt to "impair the inherent attributes of" the Armstrong County Court's decision. *Id.* Although it is couched in prospective rather than retroactive terms, the effect of Act 150 is to re-open the decision of the Armstrong County Court and (for purposes of congressional redistricting) to change the line between the two precincts back to its pre-March 15, 2002 location. Like the statute in *Titusville Iron-Works*, Act 150 is an unconstitutional "expository act" which specifies the "construction [to] be given to" Act 150. 122 Pa. at 633. Thus, if applied in the manner for which the

Presiding Officers advocate, Act 150 will "interfere . . . by legislative fiat" with a "final judgment[] of the judicial branch." *Sutley*, 378 A.2d at 783. Under well-established principles of Pennsylvania law, however, the General Assembly cannot "negate[] the effect of [the Armstrong County Court's] decision." *First National Bank of Fredericksburg*, 520 A.2d at 899.[1]

C. THE PRESIDING OFFICERS HAVE FAILED TO DEMONSTRATE THAT ACT 34'S NONCOMPLIANCE WITH THE "ONE PERSON, ONE VOTE" RULE WAS UNAVOIDABLE

Finally, the Presiding Officers argue that they should be forgiven for the constitutional deficiencies in Act 34 because it was passed with the best of intentions. Presiding Officers' Memorandum in Support of Motion for Summary Judgment at 12-13. The Presiding Officers state that it is the Plaintiffs' burden to show that they did not make a good-faith effort to pass a constitutional plan. *Id.* at 12. However, plaintiffs do not have to prove that the deviations in the defendant's

[1] In an effort to avoid the doctrine that the legislature may not interfere with a judicial decision after judgment has been reached, the Presiding Officers cite *Chester School District's Audit*, 151 A. 801 (Pa. 1930), for the proposition that "[i]n a matter concerning public interests, rather than private rights, the legislature may act so as to change the outcome of a court decision." Presiding Officers' Memorandum in Support of Motion for Summary Judgment at 10. The rulings in *Sutley*, *Shaffer*, and *First National Bank of Fredericksburg*, however, all of which were decided much more recently than *Chester School District's Audit*, demonstrate that Pennsylvania courts have not hesitated to apply the doctrine even in cases involving public rights. For example, there can be no doubt that criminal cases such as *Sutley* and *Shaffer* involve public rather than private rights. The Commonwealth is a party to all criminal cases, and these cases concern the public's interest in enforcement of the laws for an orderly society. Yet the Pennsylvania Supreme Court held in both *Sutley* and *Shaffer* that the General Assembly could not tamper with a final judgment. Similarly, *First National Bank of Fredericksburg* also dealt with a public right (the right of the Commonwealth to levy taxes). In that case as well, the court refused to permit legislative interference with a final judicial decision.

plan resulted from bad faith. Rather, plaintiffs need only show that the "population differences among districts *could have been reduced or eliminated* by a good-faith effort to draw districts of equal population." *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) (emphasis added). The Constitution '"permits only the limited population variances which are *unavoidable* despite a good-faith effort to achieve absolute equality, or for which justification is shown.'" *Id.* (citation omitted) (emphasis added).

Here, there can be no doubt that the 97-person deviation in Act 34 was avoidable; both Plaintiffs and Senator Mellow have submitted plans that have deviations of only one person. Thus, whether the Presiding Officers acted in good faith is irrelevant.

Nor is there any justification for the 97-person deviation. The Presiding Officers seek to rationalize it by arguing that the Armstrong County Board of Elections moved the boundary line to accommodate Congressman John Murtha. However, because it was the General Assembly – not the Armstrong County Board – that passed Act 34 with an unconstitutional deviation, it is the General Assembly's justification that must be proved. Because the Presiding Officers offer no justification by the General Assembly in support of the deviation, they cannot satisfy their burden, and summary judgment should be denied.

IV. CONCLUSION

For all the reasons stated above, this Court should deny the Presiding Officers' Motion for Summary Judgment.

Respectfully submitted,

Dated: January 7, 2003

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CERTIFICATE OF COMPLIANCE WITH LR 7.8(b)(2)

I, Mark Packman, hereby certify as of January 7, 2003, that the Memorandum of *Amicus Curiae* Senator Robert J. Mellow in Opposition to Presiding Officers' Motion For Summary Judgment, filed concurrently herewith, does not exceed the 5000-word limit set forth in LR 7.8(b)(2).

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