

county court of common pleas may not modify the Congressional district boundaries put in place by the General Assembly of Pennsylvania, (2) under principles of statutory construction, the Act 34 plan is a zero deviation plan, and (3) even if this Court should conclude that the March 15, 2002 order of the Armstrong County Court of Common Pleas modified the LDP data used by the General Assembly to create the Act 34 plan, under the *Karcher* test, the General Assembly made a good faith effort to draw a zero deviation plan.

Section 6.2 of Act 150 adds a new Section 506 to the Pennsylvania Election Code (to be published at 25 P.S. §2706). Section 506 is an additional protective measure enacted to assure that future elections in Pennsylvania conform to the one-person, one-vote principle. This statute helps rather than harms the Plaintiffs, who are now seeking to overturn a safeguard of the rights that they purport to be trying to uphold. Accordingly, Plaintiffs lack standing to challenge the constitutionality of Section 506. *See Blum v. Yaretsky*, 457 U.S. 991, 1001-02 (1982) (parties lacked standing to challenge medical transfers to higher level of care, in part, because transfer to higher level conferred benefit, rather than injury); *Egan v. Belcher*, 118 F.3d 1148, 1150 (7th Cir. 1997) (plaintiffs lacked standing to challenge Indiana provision providing for appellate review of ALJ decisions where "on balance [it] makes them and the class of other applicants better off"); *Mushero v. Ives*, 949 F.2d 513, 521 (1st Cir. 1991) (parent could not challenge Maine's AFDC provision that provided benefit not available to non-AFDC families where parent was in the AFDC program and therefore benefited, instead of injured, by the provision). There is no case or controversy with respect to Section 506 that would give rise to Article III jurisdiction of the federal courts.

Presiding Officers nevertheless address the state-law issues raised by Plaintiffs and Senator Mellow because the arguments are fundamentally flawed and this Court is entitled to a full presentation on all issues raised.

The March 15 and July 29, 2002, orders of the Armstrong County Court do not even mention, let alone address, the issue of congressional district boundaries. The county court addressed only the issue of a change to the boundary between the two election districts of South Buffalo Township. The county court did not purport to be able to change a voting district boundary that is constitutionally- or statutorily-directed to be set by another entity, such as by the Pennsylvania Legislative Reapportionment Commission (state legislative districts) or the General Assembly (congressional districts).

This Court's recognition of the pre-March 15 boundary between the two election districts of South Buffalo Township as the boundary between the 3rd and 12th Congressional districts under the Act 34 plan would not be inconsistent with the change purportedly made by the county court. Just as it did in the May Primary and November General 2002 Elections held under the Act 1 plan, the Armstrong County Board of Elections will administer congressional elections under the Act 34 plan in accordance with the pre-March 15 boundary and other elections in accordance with the post-March 15 boundary, unless directed otherwise by a decision in the state court case initiated by Senator Mellow in Commonwealth Court of Pennsylvania, in which the Board is a third-party respondent.

II. THE MARCH 15, 2002 ORDER OF THE ARMSTRONG COUNTY COURT WAS NOT A FINAL JUDGMENT

Both Plaintiffs and Senator Mellow assert that the March 15, 2002 order was a final judgment. Plaintiffs assert that, as such, the *Rooker-Feldman* doctrine prohibits this Court from addressing its propriety. *See* Plaintiffs' Opposition at 6-7. Senator Mellow asserts that as such "the General Assembly cannot overturn it by

passing a statute that has the effect of negating that judgment."² Senator Mellow's Opposition to Presiding Officers' Memo at 11-16. Both are wrong.

A. *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine is derived from 28 U.S.C. §1257, which provides that "final judgments of decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court." Through *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983), the Court determined that federal district courts lack subject matter jurisdiction to review final adjudications or to evaluate constitutional claims that are "inextricably intertwined with [a] state court's denial in a judicial proceeding." The doctrine, however, does not preclude federal court jurisdiction if the state court action was "legislative" or "ministerial" in nature, as opposed to "judicial" or "adjudicative." See *Feldman*, 460 U.S. at 476 ("crucial question in this case ... is whether the proceedings before the [state court] were judicial in nature"); *Guarino v. Larsen*, 11 F.3d 1151, 1157 (3d Cir. 1993) (application of *Rooker-Feldman* doctrine "turns on whether any action of the Pennsylvania Supreme Court amounted to an adjudicative act").

The Court explained in *Feldman* that "the nature of a [state court] proceeding 'depends not upon the character of the body but upon the character of the proceedings'" and that "it is the nature and effect [as opposed to its form] which is controlling." 460 U.S. at 477-78 (citing *Prentis v. Atlantic Coast Line Co.*, 211

² Senator Mellow's argument that Act 34 violates the one-person, one-vote principle has the acerbity of sour grapes. As Senator Mellow admits, no member of the General Assembly challenged the Act 34 plan during its consideration as failing to remedy the population deviation of Act 1 that this Court found violative of the one-person, one-man principle. See Senator Mellow's Response to Statement of Material Facts at 5. Senator Mellow is a member of the General Assembly. In fact, he is the Minority Leader of the Senate. One must wonder why he did not raise the issue during the General Assembly's consideration of the bill that became Act 34.

U.S. 210, 226 (1908), and *In re Summers*, 325 U.S. 561, 566-567 (1945)).³ Drawing on *Prentis*, the Court specified that a judicial inquiry "'investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist,'" whereas legislation "'looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.'" *Feldman*, 460 U.S. at 477 (quoting 211 U.S. at 226). In finding the proceeding at issue in *Feldman* adjudicative (denial requests for waivers of a bar admission rule), the Court stressed the proceedings' adversarial nature and its disposition of a "'claim of present right,'" explaining:

When [the state court] issued a per curiam order denying Feldman's petition, it determined as a legal matter that Feldman was not entitled to be admitted to the bar without examination or to sit for the bar examination. The court had adjudicated Feldman's 'claim of present right to admission to the bar' ... and rejected it. This is the essence of a judicial proceeding.

Id. at 480-81 (internal citations omitted). See *Guarino*, 11 F.3d at 1159 ("In all of the Supreme Court cases finding a proceeding to be adjudicative, the proceeding involved the application of existing rules" to specific facts); *Valenti v. Mitchell*, 790 F.Supp. 551, 554-55 (E.D. Pa. 1992) (Pa. Supreme Court order promulgating "boundaries of electoral districts along with the election schedule" was "quasi-statutory," i.e., legislative in nature).⁴

Moreover, the *Rooker-Feldman* doctrine applies only to parties which could have appealed the state court decision at issue. *Johnson v. DeGrandy*, 512 U.S.

³ Deciding the nature of a state court proceeding for purposes of applying the *Rooker-Feldman* doctrine is an issue of federal law. See *Feldman*, 460 U.S. at 476.

⁴ Judge Gawthrop's summary in *Valenti*, 790 F.Supp.at 553 is instructive:

Adjudicative acts are the paradigm of what a court does: apply existing law to specific facts and parties. Non-adjudicative acts are quasi-legislative: promulgating general rules to as-yet-identified parties. Adjudicatory acts are specific, often retrospective, and they deal with particular individuals and the delimitation of their rights under existing law. Non-adjudicative acts are general, usually prospective, and delimit the rights of unspecified individuals.

997 (1994) (*Rooker-Feldman* inapplicable as invoked against United States where same was not a party to state court proceedings); *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834 (3d Cir. 1996) (challenge by third parties to gag orders entered in state court not barred by *Rooker-Feldman* because litigants were not parties to state court proceedings); *Valenti v. Mitchell*, 962 F.2d 288 (3d Cir. 1992) (*Rooker-Feldman* doctrine did not bar district court from hearing claims for injunctive relief brought by litigants not parties to prior state court action).

Here, no Defendant was a party to the proceedings before the Armstrong County Court. The only party before the county court was the Board of Elections, whose petition to alter the boundary lines was unopposed. As approval was granted, there was no party to take an appeal. The *Rooker-Feldman* doctrine cannot act as a bar to arguments made by Defendants in this case.

B. Separation-Of-Powers Doctrine

Under the separation-of-powers principle invoked by Senator Mellow (a state law issue), the General Assembly is prohibited from altering a final judgment of a Pennsylvania court through subsequently enacted legislation. *See e.g., Commonwealth v. Shaffer*, 734 A.2d 840, 843-44 (Pa. 1999) (legislature cannot, by an act of assembly, overrule a judicial decision). A "judgment" or "judicial" decision presupposes redress of an injury in accordance with existing law and a concrete controversy between adverse parties. *See* 10 STD. PA. PRACTICE 2D §65.1 (judgment is a court's decision in "proceedings instituted therein for redress of injury," is "defined as a court's official and final determination of the rights and obligations of the parties," "is the conclusion of the law upon the matters contained in the record," and "is the last word in a judicial controversy").

Notably, in the cases Senator Mellow cited, the judgments not permitted to be altered exhibited the requisite adversity and pronouncement of legal rights. *See e.g. Greenough v. Greenough*, 11 Pa. 489 (1849) (prohibiting General Assembly

from altering will contests in which it had been determined that testator's making of a mark by his name at the foot of a will, without proof that the name was written at his express direction, was not the signature required by the Act of 1833); *Commonwealth v. Sutley*, 378 A.2d 780 (Pa. 1977) (individual sentencing judgments could not be reopened under amendment providing for re-sentencing if individuals committed crime for which penalty was now reduced); *Shaffer*, 734 A.2d 840 (Pa. Supreme Court's decision in *Commonwealth v. Besch*, which could not be overruled by applying amendment to Pennsylvania Corrupt Organizations Act retroactively, involved application of law to individual defendant prosecuted as conspirator); *First National Bank of Fredricksburg v. Commonwealth*, 520 A.2d 895 (Pa. Cmwlth. 1987), *aff'd*, 553 A.2d 937 (Pa. 1989) (decision in *Dale National Bank v. Commonwealth*, which Commonwealth Court decided could not be invalidated by subsequent legislation imposing tax substantially identical to tax invalidated in *Dale*, involved concrete dispute between bank and state over state's method of computing amount of bank share taxes owed by bank).

In *Chester School District's Audit*, 151 A. 801 (Pa. 1930), the Pennsylvania Supreme Court considered whether an amendment to the School Code could be applied retroactively to permit school directors to have audits opened under which they were assessed surcharges. The Pennsylvania Supreme Court disagreed with the lower court's dismissal of their claims on the basis of the separation-of-powers doctrine:

It is undoubtedly true that, where only private interests are concerned, a final judgment cannot be overthrown by a statute subsequently passed; ... Here, however, private interests are not involved, but only those that are public, -- the State is dealing with one of its purely public creatures, charged with the performance of a portion of the State's duty. Under such circumstances, unless constitutionally inhibited, the control of the State is without limitation.

Id. at 804.

C. Fixing And Changing Election District Boundaries Is A Legislative Or Administrative Task

The Pennsylvania Constitution vests in the General Assembly the power to determine how the boundaries of election precincts are to be fixed and changed. *See* PA. CONST. art. VII, §9.⁵ The General Assembly provided for the fixing, changing and reporting of election district boundaries in sections 501-505 and 535-538 of the Pennsylvania Election Code, 25 P.S. §§2701-2705, 2747-2750. In section 502 of the Pennsylvania Election Code, 25 P.S. §2702 (purported to provide the basis for the Armstrong County Court's action), the General Assembly delegated a portion of its legislative authority over election district boundaries to courts of common pleas in those counties where the districts are located.⁶ *See Palmer Township Annexation Case*, 416 Pa. 163, 204 A.2d 760 (1964) (involving General Assembly's delegation of legislative power to court of quarter sessions concerning annexations).

Subject to the restrictions set forth in 25 P.S. §2746, an alteration in election district boundaries may be made by the court if it finds that the alteration will meet the standard set forth by the legislature, i.e., "suit the convenience of the electors and [] promote the public interest." *See* 25 P.S. §2702. Local Boards of Elections are empowered to seek this change, and the proceedings, as occurred here, may be uncontested. In making the alteration, the court is not adjudicating the rights of a party or settling a dispute – traditional indicia of a judicial "judgment" and of judicial action – but engaging in quasi-legislative activity.

⁵ This provision provides:

Fixing election districts

Townships and wards of cities and boroughs shall form or be divided into election districts of compact and contiguous territory and *their boundaries fixed and changed in such manner as may be provided by law.* (Emphasis added.)

⁶ The General Assembly could have designated boundaries for election districts through legislation or delegated the authority to the Executive Branch.

D. Application Here

A petition to change the boundary of an election district is not the type of "judicial" proceeding that produces a "judgment" triggering respect under the *Rooker-Feldman* doctrine or the separation-of-powers principle cited by Senator Mellow. Accordingly, the *Rooker-Feldman* doctrine does not preclude this Court from considering whether the Armstrong County Court's decision of March 15, 2002 has any legal relevance to the situation present here.

Nor does the Pennsylvania separation-of-powers doctrine come into play. The situation here is analogous to that in *Chester School District's Audit*. The issue before the county court was the approval of a change to an election district boundary for the convenience of the voters. *See* 25 P.S. §5702. No private interests were decided by the March 15 order; no individual interest was affected.⁷ The process by which election districts may be created and adjusted is one in the control of the legislature and subject to change at any time.⁸

Moreover, Section 506 (Section 6.2 of Act 150) does not amend the Act 34 plan. It is a new section added to the Pennsylvania Election Code that addresses how the 67 county boards of elections in Pennsylvania are to administer state legislative and congressional elections. It applies not to elections that have

⁷ Senator Mellow argues that public interests were also at issue in *Sutley* and *Shaffer* because "[t]he 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." Senator Mellow's Opposition at 16 n.1. While certainly the public is interested in the enforcement of criminal laws, there are also individual rights directly affected in criminal cases. Individuals may lose their freedom or have to pay fines. The difference between this case and those relied on by Senator Mellow is that, in those cases, specific private parties were directly impacted by the application of the law in situations where they were adverse to other parties.

⁸ Senator Mellow's argument that the Armstrong County petition for approval of an election district boundary line change is an "*in rem*" proceeding and that, therefore, the election district boundary is a "*res*" and an "adverse party" is certainly original but also wrong. *See* Senator Mellow's Opposition to Executive Officers' Memo at 7. Unlike a vessel or deed of trust, however, no individual or entity can claim a right to an election district boundary line.

occurred, but to elections that will take place after its effective date of December 9, 2002. It does not change the manner in which Act 34 plan has been administered because the Act 34 plan has not yet been administered. Accordingly, Senator Mellow's reliance on *Titusville Iron Works v. Keystone Oil Co.*, 122 Pa. 627, 15 A 917 (1888), which concerned a legislative attempt to redefine a term fixed by judicial interpretation, is misplaced and inapplicable.

III. THE ENACTMENT OF ACT 150 DID NOT VIOLATE PA. CONST. ART. III, §6

Plaintiffs' argument that the enactment of Act 150 (Section 506) violated PA. CONST. art. III, §6 is premised solely on their assertion that "Act 150 can only be understood as an amendment to Act 34 [because p]rior to Act 150, Act 34 meant one thing and after Act 150, Act 34 meant something else." Plaintiffs' Opposition at 9. Plaintiffs' argument fails because Section 506 does not amend Act 34. Section 506 is an amendment to the Pennsylvania Election Code, which does not include Act 34.

Section 506 concerns the administration of elections. It directs the 67 county boards of elections in the Commonwealth, where election districts are used to define state legislative and congressional district boundaries, to use the election district boundaries that existed and were recognized by the Pennsylvania Legislative Reapportionment Commission in adopting a final state legislative reapportionment plan. In other words, to ensure that the one-person, one-vote principles of the U.S. CONST. art. I and amend. XIV will not be inadvertently violated once county boards of elections are again permitted to request and county courts of common pleas are allowed to approve changes to election district boundaries (when all litigation involving the Act 34 plan is concluded), Section 506 mandates that election districts boundaries on which the LDP data (2000 Census data assigned to election districts that appears in Tab J of the Appendix)

are based will be used for the administration of state legislative and Congressional elections until any redistricting required by the 2010 Census.

PA. CONST. art. III, §6 prohibits amendments solely by reference to a law's title, requiring that the amendment be published. Section 6.2 of Act 150 amended the Pennsylvania Election Code by adding new section 506. New Section 506 was set forth in its entirety, in compliance with Article III, §6. As the Pennsylvania Supreme Court reiterated in upholding a law challenged as violative of Article III, §6 in *L.J.W. Realty Corp. v. Philadelphia*:

'The constitution does not make the obviously impracticable requirement that every act shall recite all other acts that its operation may incidently affect, either by way of repeal, modification, extension or supply.' *Searight's Estate, Stuart's Appeal*, 163 Pa. 210, 217, 19 Atl. 800 (1894). ...

The purpose of section 6 of the Constitution, along with other provisions pertaining to legislation in Article III of the Constitution, was to provide full notice and publicity to all proposed legislative enactments, and thus to prevent the passage of "sneak" legislation. As long ago as the *Greenfield Avenue* case, 191 Pa. 290, 296-297, 43 Atl. 225 (1899) we said that 'an act which is complete in itself - the purpose meaning and full scope of which are apparent on its face - is valid, [and not violative of Article III, section 6], although it may operate to alter, extend or repeal a prior act ... ' ...

390 Pa. 197, 205, 134 A.2d 878, 882 (1957) (brackets original).

The modification of a bill on concurrence, as Plaintiffs imply, does not constitute "sneak" legislation. As the Pennsylvania Supreme Court has stressed, Article III's directives do not impose any particular time frame for consideration of the final form of legislation. *See Consumer Party v. Commonwealth*, 510 Pa. 158, 182, 507 A.2d 323, 335 ("Implicitly, appellants are seeking to extend the language of Article III, section 1 to provide for a sufficient time frame during consideration of the measure in its ultimate form for communication between the constituency and the legislature before a vote is taken. There is nothing in the language of Article III, section 1 that would support such an interpretation."); *Pennsylvania AFL-CIO v. Commonwealth*, 563 Pa. 108, 119, 757 A.2d 917, 923 (purpose of

Article III not undermined when committee amends bill after different versions passed by both houses).

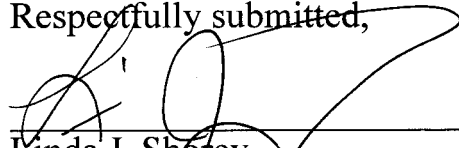
Section 506 does not direct a previously judicially-construed statute to be construed differently, as in the cases Plaintiffs rely on –*Titusville Iron-Works* and *Commonwealth v. Sutley*. See Plaintiffs' Opposition at 13-14. Act 34 has never been construed by a court. In fact, the Act 34 plan has yet to be administered.

CONCLUSION

For the reasons set forth above and in Presiding Officers' memorandum in support of summary judgment, this Court should enter judgment in favor of Defendants and against Plaintiff.

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Respectfully submitted,



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