ORIGINAL

1:01-CV

(162)

5-2-02

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

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

PRESIDING OFFICERS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO IMPOSE REMEDIAL DISTRICTS AND, IN THE ALTERNATIVE, TO REJECT ACT 34 AND BEGIN REMEDIAL HEARINGS

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BACKGROUND

On April 8, 2002, this Court declared the congressional redistricting plan 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."

On April 17, 2002, the General Assembly enacted a bill (HB 2545, PN 3726) containing a revised congressional redistricting plan for Pennsylvania. On April 18, 2002, Governor Schweiker signed the bill into law as Act No. 2002-34 ("Act 34"). Act 34 repeals Act 1 and puts in place a revised congressional redistricting plan.

On April 22, 2002, Plaintiffs moved for the imposition of remedial districts and, in the alternative, to reject Act 34 and begin remedial hearings ("Remedial Motion"). Plaintiffs' motion attacks the validity of the Act 34 plan but Plaintiffs have not sought leave to amend their complaint to challenge the new Act. On April 23, 2002, this Court stayed its injunction, allowing the 2002 congressional elections to be conducted under Act 1; it also 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." Because of the stay of the injunction, the repeal of Act 1 will be effective on November 6, 2002 and the revised plan in Act 34 will take effect for congressional elections in 2004.

ARGUMENT

I. POWER OF THE FEDERAL JUDICIARY

Plaintiffs urge this Court to impose a redistricting plan on the Commonwealth. Yet, the cases they cite in support of their motion are distinguishable from the present situation. This Court did not order the parties to

submit remedial proposals for its review and approval, as was done in *Burns v. Richardson*, 384 U.S. 73 (1966),[1] and various other decisions cited by Plaintiffs. *See* Remedial Motion at 5. Rather, this Court directed the 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." Although no one could guarantee or compel a new enactment, the General Assembly nevertheless enacted a new plan. The difference is significant. Competing remedial proposals are not valid until adopted but enacted legislation is deemed constitutional until proven otherwise.

Nor is the Court facing the situation referred to in *Scott v. Germano*, 381 U.S. 407 (1965), where the legislature failed to replace an invalidated plan despite having had a reasonable opportunity to do so. *See also Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("Legislative bodies should not leave their reapportionment tasks to federal courts; but when those with legislative responsibilities do not respond ... it becomes the 'unwelcome obligation' of the federal courts to devise and impose a reapportionment plan pending later legislative action") (internal citations omitted). Here, the General Assembly enacted Act 34, and the plan encompassed within that Act must be presumed constitutional until proven otherwise. As *Wise* suggests, even if a court adopts a plan, a subsequent legislative enactment can supersede the court's plan. *A fortiori*, when a legislature acts prior to the creation of a court-ordered plan, it would be a misstep for a court to treat the enactment as just one of a universe of potential plans competing for judicial adoption.

Presiding Officers do not argue that a three-judge court cannot retain jurisdiction to review and approve remedial plans in a remedial phase. It is proper for a court to retain jurisdiction because of the contingency (which in many cases,

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[1] In *Burns*, the legislature was, in effect, a party, as all the members of the Hawaii Senate and House had "intervened as parties defendant." 384 U.S. at 76.

but not here, becomes a reality) that the legislature will not be able to agree on a new plan, forcing the Court to enter a remedial phase.

Plaintiffs complain that "Defendants, in defiance of this Court's April 8 order, have expressly refused to submit the new plan to this court for evaluation as a potential remedy." Remedial Motion at 1. Plaintiffs misperceive the facts and the proper roles of the parties, the Court and the General Assembly. Presiding Officers brought Act 34 to the attention of the Court as soon as possible, attaching it to their renewed motion for stay. This Court, in any event, could take notice of the enactment of the new law, without action by any party.

Moreover, the Court's order of April 8 did not order the Defendants to submit anything. To be precise, the provision in the order for submission of a plan was directed to the General Assembly, not to Defendants. And, the General Assembly, as a non-party, could not be ordered to submit a duly-enacted statute for review and approval by a federal court before it takes effect. *See Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party"); Wright & Miller, 12 FEDERAL PRACTICE AND PROCEDURE §3033 (1997) (judgment may be enforced only against a party). Further the Commonwealth, of which the General Assembly is a part,[2] was dismissed as a party on grounds of its immunity.[3] Dismissing the Commonwealth necessarily included a dismissal of its

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[2] *See* PA. CONST. art. II, §1 ("legislative power of this Commonwealth shall be vested in a General Assembly"), *see also Moyer v. Conti*, 2000 U.S. Dist. LEXIS 14604, *11 (E.D. Pa. 2000) (Pennsylvania Senate is "an alter ego of the state for Eleventh Amendment purposes"); *Larsen v. Senate*, 955 F. Supp. 1549, 1561 (M.D. Pa. 1997), *aff'd in part, rev'd in part*, 154 F.3d 182 (3d Cir. 1998) ("Senate is entitled to Eleventh Amendment immunity").

[3] While Presiding Officers are defendants, they cannot themselves compel the General Assembly to enact legislation. PA. CONST. art. III imposes procedural directives on the enactment of legislation, such as, among others, that it be passed by bill, which must (1) be referred to a committee in each chamber; (2) be printed; (3) contain only one subject (unless a general appropriations bill) that is clearly expressed in its title; (4) be considered on 3 days in each chamber; (5) be printed

legislative branch. Finally, it violates principles of federalism for this Court to direct the General Assembly to "prepare, enact and submit [a congressional redistricting plan] for review and approval." *See New York v. United States*, 505 U.S. 144 (1992) (Congress may not commandeer State's legislative processes); *id.* at 161 ("'this Court has never sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations'") (quoting *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982)).

The Court's order of April 8 nevertheless accomplished something significant, regardless of the words chosen. Besides enjoining the plan under Act 1, it effectively gave notice to the parties that the Court would defer further action for a limited time, to give the General Assembly the opportunity to which it was entitled to enact new legislation. A new statute, Act 34, has now superseded the old plan for future election cycles.

Presiding Officers do not contend it would be improper for this Court to retain jurisdiction to consider a constitutional challenge to the Act 34 plan. But, because Plaintiffs have not sought leave to amend their complaint to challenge the constitutionality of the Act 34 plan, no "case or controversy" is before this Court regarding the validity of the Act 34 plan. Plaintiffs should not be allowed to avoid the need to amend their claim by moving directly to a remedial phase. Because a new statute has been passed, Plaintiffs bear a new burden of pleading and proof.

Even if this Court should conclude that it retains jurisdiction to review the constitutionality of the Act 34 plan without the filing of a new or amended pleading challenging that plan, its review should be limited to determining, with due regard to the presumption of constitutionality and the burden of proof that

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with all amendments before final vote; (6) voted for by a majority of the members elected in each chamber; (7) be signed by the presiding office of each House in the presence of the each House's members; and (8) be presented to the Governor.

Plaintiffs bear, whether the General Assembly corrected the constitutional deficiency found in Act 1, i.e., one-person, one-vote. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982) ("An appropriate reconciliation of the[] two goals [reconciling requirements of the Constitution with goals of state political policy] can only be reached if the district court's modifications of a state plan are limited to those necessary to cure any constitutional or statutory defect"); *White v. Weiser*, 412 U.S. 783 (1973) (district court should have imposed Plan B, which adhered to desires of state legislature while attempting to alleviate one-person, one-vote violation found in the previous plan); *Cook v. Luckett*, 735 F.2d 912 (5th Cir. 1984) (district court, which considered more than correction of constitutional flaws found in County's enacted plan, erred in adopting plaintiffs' proposed remedial plan instead of County's proposed remedial plan); *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988) ("Where [] the legislative body does respond with a proposed remedy, a court may not thereupon simply substitute its judgment of a more equitable remedy ...; it may only consider whether the proffered remedial plan is legally unacceptable because it ... fails to meet the same standards applicable to an original challenge of a legislative plan in place.").

II. ALLEGED FAILURES OF ACT 34

Plaintiffs argue in their motion that the Act 34 plan is invalid. Should this Court conclude it can review the Act 34 plan, the flaws to which Plaintiffs point do not provide a legal basis on which to invalidate Act 34.

A. Alleged Population Deviation

Relying on a March 15, 2002 order of the Court of Common Pleas of Armstrong County altering the boundaries between two precincts, Plaintiffs contend that the revised congressional redistricting plan in Act 34 has a total population deviation of 97. There are, however, multiple reasons why the county court decision, entered before this Court invalidated Act 1, is irrelevant.

1. Statutory prohibitions

The Armstrong County Court acted without authority. The court purportedly acted under 25 P.S. §2702, which provides in relevant part:

> Subject to the provisions of section 501 of this act [25 P.S. §2701], the court of common pleas of the county in which the same are located, may form or create new election districts by dividing or redividing any borough, township, ward or election district into two or more election districts of compact and contiguous territory, having boundaries with clearly visible physical features and *wholly contained within any larger district from which any Federal, State, county, municipal or school district officers are elected,* or alter the bounds of any election district, or form an election an election district out of two or more adjacent districts or parts of districts, or consolidate adjoining election districts or form an election district out of two or more adjacent wards, so as to suit the convenience of the electors and to promote the public interest. (Emphasis added.)

South Buffalo Township has only two precincts, i.e., election districts.[4] The Armstrong County Court "Ordered and Decreed that the existing South Buffalo Township Election Districts known as the Western Election District and the Eastern Election District shall be realigned so as to transfer a portion of the Western District to the Eastern District." *See* Exhibit B to Remedial Motion. In effect, the court redivided Buffalo Township and established two new election districts. Two statutory restrictions prohibit this action.

First, as the italicized language shows, a court of common pleas may not divide a precinct so as to move individuals from one electoral district to another, including a congressional district. At the time the county court reestablished the South Buffalo Township precincts, Act 1's congressional redistricting plan was in effect and presumed valid. The county court had no authority to modify the congressional redistricting boundary, which is what plaintiffs contend it did by

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[4] An election district is the smallest unit in Pennsylvania to which specific geographic boundaries are assigned for purposes of delineating where an individual will vote. It is commonly referred to as a "precinct.".

moving part of one election district that was in the 3rd Congressional District to the township's other election district that was in the 12th Congressional District.

Second, 25 P.S. §2746 ("Restrictions on Alteration") imposes restrictions on the power to modify election districts, providing, in relevant part, that "there shall be no power to establish, abolish, divide or consolidate an election district during the period from June 1, 2000, through April 30, 2002." This provision, enacted in 1999 and similar to a 1989 enactment, was intended to address the issue that Plaintiffs raise. In anticipation of the 2000 census, which would trigger legislative and congressional redistricting, the Legislative Data Processing Center needed a freeze on local precinct modifications, so that it could conform census data to voting precincts. The Armstrong County proceedings violated this prohibition.

2. Constitutional Prohibition

As noted above, the effect of moving a portion of a precinct located in the 3rd Congressional District to a precinct located in the 12th Congressional District was to alter the boundary between congressional districts. No court has the power to change a congressional district's boundaries outside of a constitutional challenge and, even then, a court's power is extremely circumscribed.

The U.S. Constitution gives authority to state legislatures to establish the time, place and manner for electing members of Congress. U.S. CONST. art. I, §4, cl.1 ("[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"). This power includes the power and the duty of a state legislature to redivide a state into congressional districts in accordance with the most recent federal decennial census and the congressional seats apportioned to it. As the Supreme Court has stressed, the division of a state into congressional districts is inherently a political process to be done by the state legislature. *See White*, 412 U.S. at 795-96 ("From the beginning, we have recognized that 'reapportionment is primarily a matter for

legislative consideration and determination;' ... Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task") (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)).[5]

Moreover, to permit a court of common pleas, which only has jurisdiction to alter precinct boundaries within the county or counties where it sits, to adjust precinct boundaries that constitute the boundary between congressional districts would be contrary to the one-person, one-vote principle. If Plaintiffs are correct, the precinct boundary change ordered by the county court resulted in 49 individuals being moved from the 3rd District to the 12th District at a time when Act 1 was still in effect, thereby increasing the population deviation between the highest and lowest districts to 103 (under Act 1, the 3rd district had 646,364 and the 12th had 646,369 people) and diluting the vote of electors in the 12th District. Such an action by a court of limited jurisdiction is unconstitutional. The county court's order reestablishing South Buffalo Township election districts cannot be construed to alter the boundary between the 3rd and 12th Congressional Districts because to do so would be to imbue that court with power it cannot constitutionally be given.

3. Census Data

The Act 34 plan, like the Act 1 plan, was drawn using the 2000 Federal Census data for Pennsylvania, as assigned by the Legislative Data Processing

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[5] If the change of the South Buffalo Township precincts altered a state legislative district boundary, it would violate the state constitution. Under PA. CONST. art. II, §17, the power and duty to draw state legislative districts rests with a Legislative Reapportionment Commission. When its plan becomes effective, it is used for the next decade. *See* PA. CONST. art. II, §17(e) ("When the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan shall have the force of law and the districts therein provided shall be used thereafter in elections to the General Assembly until the next reapportionment as required under this section 17."); *Albert v. 2001 Legislative Reapportionment Commission*, 790 A.2d 990, 991 (Pa. 2002) ("said Plan shall be used in all forthcoming elections to the General Assembly until the next constitutionally mandated reapportionment shall be approved.").

Center. This is the data the cartographers for both Plaintiffs and Defendants used to draw congressional boundaries.[6] Based on that data, the Act 34 plan has no population deviation. Just as population migrations may have occurred between the 2000 Census and the enactment of a congressional redistricting plan for Pennsylvania in 2002, the alteration made by the intervening judicial decision is irrelevant. *See Karcher v. Daggett*, 462 U.S. 725, 738 (1983) ("[T]he census data provide the only reliable - albeit less than perfect - indication of the district's 'real' relative population levels ... because the census count represents the 'best population data available,' it is the only basis for good-faith attempts to achieve population equality.") (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969)). *See also Kirkpatrick*, 394 U.S. at 529 n.1 (noting that plan in Missouri's Act of 1967 was based on 1960 census data); *Cromartie v. Hunt*, 133 F.Supp.2d 407, 413 n.3 (E.D. N.C. 2000) (examining 1997 plan based on 1990 census data).

4. Abstention

The question of whether the county court lacked the statutory authority to change the boundaries of the two precincts is a state law issue and this Court should abstain from addressing the issue, should it determine that the change, if effective, was one that must be taken into account by the General Assembly.

"Abstention is recognized to avoid deciding a federal constitutional question when the case may be disposed on questions of state law, *Pullman* [and] to avoid needless conflict with the administration by a state of its own affairs, *Burford*; to leave the states the resolution of unsettled questions of state law," among others. *Chiropractic America v. Lavecchia*, 180 F.3d 99, 103 (3d Cir.), *cert. denied*, 528 U.S. 930 (1999). Both of these bases are present here.

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[6] The LDP-assigned Federal Census data has been used in Pennsylvania for drawing legislative and congressional district boundaries since at least 1971. *See e.g., Mellow v. Mitchell*, 530 Pa. 44, 47, 607 A.2d 204, 205 (1992).

The time, manner and place of elections is a state issue. *See* U.S. CONST. art. II, §4. The election process in Pennsylvania, including the delineation of precincts, is highly regulated. Article VII of the Pa. Constitution addresses elections. Section 9 of Art. VII states: "Townships and wards of cities and boroughs shall form or be divided into election districts [precincts] of compact and contiguous territory and their boundaries fixed and changed in such manner as may be provided by law." Article V of the Pennsylvania Election Code, 25 P.S. §§2701-2750, provides for creation and change of precincts; the General Assembly is free to amend the process at any time. Accordingly, the question of whether the county court had the power to alter precinct lines so as to change the boundaries of a congressional district (or a legislative district) under current law is one that should be left to the Pennsylvania courts to decide. Further, if it deems it necessary or desirable, the General Assembly may enact legislation to clarify that the boundaries of congressional districts cannot be modified by changes in precinct boundaries or to clarify that precinct boundaries defining a state legislative or a congressional district may not be changed.

B. Alleged Unconstitutional Discontiguity

Plaintiffs allege as a second constitutional flaw in the Act 34 plan the existence of a discontiguity in that "a portion of Birmingham Township in District 16 is geographically submerged within District 7, [and] at no point connected to the rest of District 16."[7] *See* Remedial Motion at 9. In support, however, Plaintiffs point to neither a requirement of the United States Constitution (because there is

[7] Plaintiffs also note that two other discontiguous municipalities were joined by splitting precincts. *See* Remedial Motion at 2 n.1. Plaintiffs fail to mention that the splits involved no population. As with the discontiguity situation in Birmingham Township, the areas causing discontinuity are not populated and are not likely to be so (one encompasses a small part of the Juniata River from the west bank to the middle of the river; another is a wetland).

none) nor federal statute.[8] Instead, they rely only on PA. CONST. art. II, §16, which requires contiguity in state legislative districts.

Plaintiffs admit that PA. CONST. art. II, §16 applies only to state legislative districts but argue that "courts have the power to look to state law governing legislative districting when a state is otherwise silent on its policy with respect to congressional districts." *See* Remedial Motion at 10. Reference is made to Justice Steven's dissent in *Shaw v. Hunt*, 517 U.S. 899, 918-951 (1996), and *Nerch v. Mitchell*, No. 3:CV-92-0095 (M.D. Pa. 1992) (Stapleton, Rambo and Pollack). Neither, however, elevate a state constitutional provision governing state legislative redistricting to the level of a constitutional requirement when enacting a congressional redistricting plan.

In his dissent in *Shaw*, Justice Stevens rejected the reasoning of the majority that the non-compact appearance of congressional District 12 suggested the North Carolina legislature had engaged in suspect race-based redistricting, explaining:

> There is no federal statutory or constitutional requirement that state electoral boundaries conform to any particular ideal of geographic compactness. In addition, although the North Carolina Constitution

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[8] U.S. CONST. art. I, §4 provides: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." The Act of August 8, 1911, 37 Stat. 13, required congressional districts to be single member, contiguous and compact. In 1929, Congress changed the apportionment statute by adding provisions governing the Bureau of the Census and its activities and giving the Executive Branch the power to determine the number of representatives each state would have. *See* Act of June 18, 1929, 46 Stat. 21, §22. The Act of 1929 provided no requirements for Congressional districts. In *Wood v. Broom*, 287 U.S. 1, 6-7 (1932), the Supreme Court determined that the Act of 1911 (which contained requirements as to compactness, contiguity, and equality in population) had expired by its own terms and that the Act of 1929 contained no similar provisions: "It was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929. This appears from the terms of the act, and its legislative history shows that the omission was deliberate." *Id.* at 7. In 1941, a statute similar to the 1929 Act was codified at 2 U.S.C. §2(a). The requirements of compactness, contiguity, equality of population and single-member districts were not revived. *See id.*

> requires electoral districts for state elective office to be contiguous, it does not require them to be geographically compact. Given that numerous States have written geographical compactness requirements into their state constitutions, North Carolina's omission on this score is noteworthy. It reveals that North Carolina's creation of a geographically noncompact district does not itself mark a deviation from any prevailing state districting principle. Thus, while the serpentine character of District 12 may give rise to an inference that traditional districting principles were subordinated to race in determining its boundaries, it cannot fairly be said to prove that conclusion in light of the clear evidence demonstrating race-neutral explanations for the district's tortured shape.

517 U.S. at 934-35 (internal citations and footnotes omitted). In corresponding footnotes, Justice Stevens pointed out that "The State Constitution [of North Carolina] sets forth no limitation on districting for federal offices" and that "the State's guide to redistricting specifically informed state legislators that compactness was of little legal significance." *Id.* at n.11 & n.12. Justice Stevens cannot be understood to have "treat[ed] a provision of the North Carolina Constitution requiring contiguity in state legislative redistricting as establishing a state policy that would also apply to congressional redistricting." Remedial Motion at 10. Rather his discussion cataloged apparent "traditional redistricting principles" in North Carolina and suggest that the shape of a district departing from those principles could be treated as evidence of race-based gerrymandering.[9]

In *Nerch*, the three-judge court was reviewing the congressional redistricting plan adopted by the Pennsylvania Supreme Court, not a legislative plan. In drawing a plan, a court is held to "stricter standards in accomplishing its task than will a state legislature." *Connor v. Finch*, 431 U.S. 407, 414 (1977); *see Wise*, 437 U.S. 535 (same); *see also Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985) (in

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[9] State redistricting principles such as contiguity and compactness may be relevant to the second prong of the *Karcher* test, i.e., justification for population deviations. State officials might argue that a deviation was caused by an attempt to adhere to such a redistricting principle. A plaintiff could respond that because certain districts appear non-compact or non-contiguous, the justification should be rejected. But a plaintiff cannot attack an otherwise constitutional redistricting plan on such grounds, as they do not rise to level of a constitutional violation.

a court-ordered plan, "equitable considerations demand a close scrutiny and mandate the fashioning of a near-optimal apportionment plan;" when asked to review the validity of a legislative plan a "federal district court is precluded from substituting even what it considers to be an objectively superior plan for an otherwise constitutionally and legally valid plan"). The three-judge court in *Nerch* merely accepted the state court's application of state policy; it did not elevate state policies to constitutional dimension for purposes of reviewing a legislatively-drawn congressional redistricting plan.[10]

C. Alleged Unconstitutional Policies

Plaintiffs, apparently addressing the justification prong of *Karcher*, argue that "Act 34 increases population deviation and still fails to further any legitimate goals." *See* Remedial Motion at 11. As pointed out above, however, there is no actionable population deviation in the Act 34 plan, which obtains "zero deviation" using the 2000 Federal Census data, as assigned by the Legislative Data Processing Center for use in legislative and congressional redistricting in Pennsylvania. Moreover, the Plaintiffs have not shown that the General Assembly did not engage in a "good-faith effort" to achieve zero deviation. The local, illegal attempt to change a congressional boundary does not taint the enactment of the General Assembly, any more than it would taint a court-ordered plan. The justification prong of *Karcher* is never reached.

Plaintiffs are correct that the congressional redistricting plan in Act 34 is a "slight revision" of the Act 1 plan. *See* Remedial Motion at 11. The Act 34 plan tracks the boundaries of Act 1 because Act 1 represented the constitutional political goals that achieved support from a sufficient number of members,

[10] The discontiguity in Birmingham Township also existed in the 1992 Plan, as the Court in *Nerch* recognized. *See* slip op. at 30 n.13 ("part of Birmingham Township in Chester County is discontiguous from the rest of the township because it is split by a waterway").

Democrat as well as Republican, of the General Assembly to pass. And, like Act 1, Act 34 only passed because it had bipartisan support in the House of Representatives, where 31 Democrats voted favorably.

While Plaintiffs complain that Act 34 is non-compact, splits municipalities and exhibits partisan bias, none of these allegations have constitutional significance and do not provide this Court with a basis for invalidating the Act. Neither compactness nor the avoidance of municipal splits are constitutional requirements for congressional redistricting plans. Partisan bias, as opposed to partisan gerrymandering, is not actionable under the equal protection clause. As the Supreme Court has recognized, "[d]istricting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task." *White*, 412 U.S. at 795-96; *see also Anne Arundel Co. Republican Central Committee v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394 (D.Md. 1991).

D. Attempt To Revive Partisan Gerrymandering Claim

Plaintiffs attempt to "renew their claim that Act 34 be struck down as an unconstitutional partisan gerrymander." *See* Remedial Motion at 13. This Court, however, dismissed the partisan gerrymandering claim to Act 1. Plaintiffs allege no new facts in their motion pertinent to a partisan gerrymandering claim. Indeed, as noted above, the congressional redistricting plan in Act 34 is but a "slight revision" of the plan in Act 1. Any claim by Plaintiffs that they would be "shut out" of the political process under Act 34 can be no greater than the claim made with respect to Act 1. This Court has already held, in the context of Act 1, that such is insufficient to establish an actual discriminatory effect as required under *Davis v. Bandemer*, 478 U.S. 109 (1986). Principles of claim preclusion and/or stare decisis should operate to prevent Plaintiffs from raising this claim to Act 34.

III. REMEDIAL PROCEEDINGS

Even if this Court should treat the allegations found in Plaintiffs' motion concerning the constitutionality of the revised congressional redistricting plan put in place by Act 34 as an amendment of their complaint challenging the Act 1 plan, and then determine that the plan violates the United States Constitution, it cannot yet proceed to devise a congressional redistricting plan for Pennsylvania. Given that this Court has decided to permit Act 1 to be used for the 2002 congressional elections, there is plenty of time for the General Assembly to enact a congressional redistricting plan before the 2004 election cycle. There is no evidence to suggest that such action would not occur.

As *Growe* instructs, if a federal court invalidates a current plan or district, it must give the state legislature reasonable opportunity to act. *See Growe v. Emison*, 507 U.S. 25, 34 (1993) ("'reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court'") (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). Federal courts may draw districts only where the state cannot or will not do so. *See id*; *Wise*, 437 U.S. 539-40; *White*, 412 U.S. at 794-95 ("judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so"). *See also* Opinion (April 8, 2002) at 11 (recognizing that the General Assembly has primary jurisdiction over congressional redistricting).

CONCLUSION

For the reasons above, this Court should deny Plaintiffs' Remedial Motion.

Respectfully submitted,

May 1, 2002

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CERTIFICATE OF SERVICE

I certify that on May 1, 2002, I caused a copy of the foregoing Response in Opposition to Plaintiffs' Motion to Impose Remedial Districts And, In The Alternative, To Reject Act 34 And Begin Remedial Hearings to be served on the following in the manner indicated:

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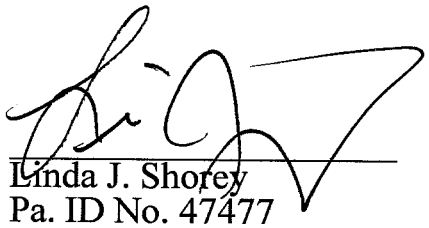

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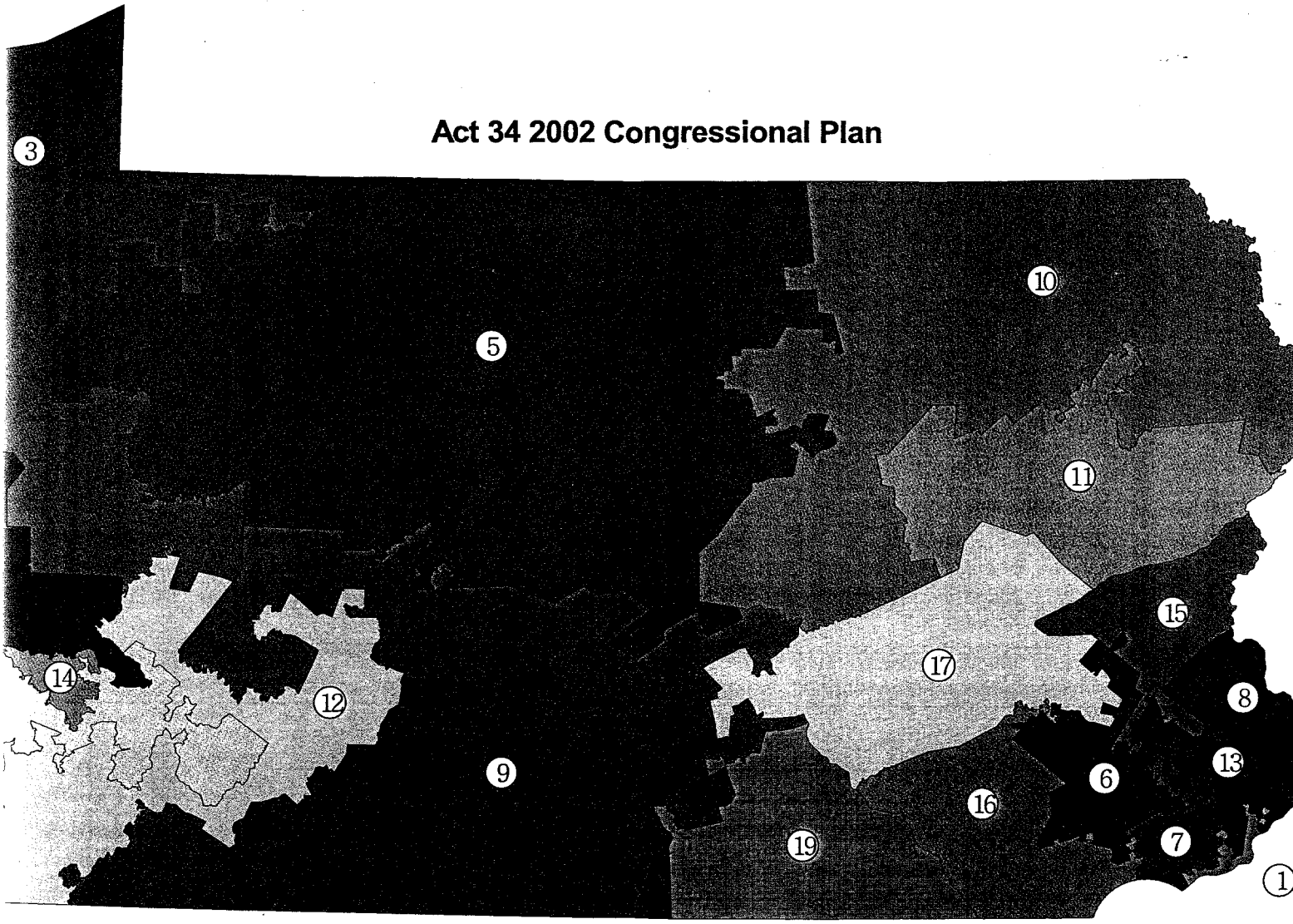
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