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MARY E. D'ANDREA, CLERK
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Deputy Clerk

**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)

**PRESIDING OFFICERS' STATEMENT OF MATERIAL FACTS IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Defendants Ryan and Jubelirer ("Presiding Officers") submit the following Statement of Material Facts in conjunction with their motion for summary judgment on the remaining issue in this case – whether the Act 34 plan complies with the one-person, one-vote principle of U.S. CONST. art. I, §2.¹

BACKGROUND

1. The 2000 Census showed that Pennsylvania had a population of 12,281,054 and that there had been significant shifts of population. See Defendants' Ex. 80, admitted at the March 11-12, 2002 hearing (Tab A).

¹ The affidavits, exhibits, certified documents and judicially noticeable documents that support these material facts are separately bound in order of the Tab letter in the Appendix to Statement of Material Facts.

2. While Pennsylvania's population increased, it did not increase as much as other states and the reallocation of Congressional seats resulted in a loss of two seats for Pennsylvania, from 21 to 19. Defendants' Ex. 79, admitted at the March 11-12, 2002 hearing (Tab B).

3. On January 7, 2002, Governor Schweiker signed into law SB 1200 as Act No. 2002-1 ("Act 1"), which contained a new congressional districting plan, necessitated by the 2000 Census that showed population shifts and resulted in Pennsylvania being allocated two less congressional seats. Defendants' Ex. 53, admitted at the March 11-12, 2002 hearing (Tab C).

4. On January 11, 2002, Plaintiffs filed an amended complaint in this matter that challenged the Act 1 plan as, *inter alia*, a violation of the one-person, one-vote principle held by the U.S. Supreme Court to be encompassed within U.S. CONST. art. I, §2, on the basis of the 19 person difference between the smallest and largest districts. *See* Docket Entry #6 and associated document.

5. The General Assembly, when enacting Act 1, was careful to accommodate Congressman John Murtha, Pennsylvania's senior representative to Congress. *See e.g.* Defendants' Ex. 2 (LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1194, 1195, 1197 (Sen. Mellow), 1199, 1204 (Sen. Brightbill), 1199 (Sen. O'Pake), 1202-03 (Sen. Wagner), 1206 (Sen. Kasunic) (Tab D); Defendants' Ex. 3 (LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 5, 14 (Rep. DeWeese), 10 (Rep. Rooney)) (Tab E); Defendants' Ex. 4 (LEGISLATIVE JOURNAL – HOUSE (Jan. 3, 2002) at 15 (Perzel)) (Tab F); Tr. Vol. III: 267 (Mascara).

6. On April 8, 2002, this Court declared the Act 1 plan unconstitutional, enjoined its use and gave the Pennsylvania General Assembly until April 29, 2002 to enact a revised congressional redistricting plan. *See* Docket Entry #137; *Vieth v. Commonwealth*, 195 F.Supp.2d 672 (M.D. Pa. 2002).

7. On April 23, 2002, this Court stayed its injunction of the Act 1 plan with respect to its use in the 2002 congressional elections. *See* Docket Entry #155.

8. On April 17, 2002, Governor Schweiker signed into law HB 2545, PN 3726 as Act No. 2002-34 ("Act 34"), which contained a revised congressional districting plan, designed to correct the one-person, one-man defect of Act 1. *See* HB 2545 History (Tab G); HB 2545, PN 3726 (Tab H); LEGISLATIVE JOURNAL – SENATE (April 17, 2002) at 1653 (Tab I).

9. Act 34 became effective on November 6, 2002 and the Act 34 plan will be used for any post-November 5, 2002 primary, general or special election for representative to Congress; as of the date of this statement of material facts, the next such election scheduled to take place is the 2004 primary election. *See* Act 34 (Tab H).

10. The Act 34 plan, like the Act 1 plan, used the boundary between the two election districts of South Buffalo Township, Armstrong County as part of the boundary between Congressional districts 3 and 12. Affidavit of Kathy A. Sullivan (Tab J).

POPULATION DATA

11. Both the Act 1 and the Act 34 plan were based on the 2000 Census data, as assigned by the Legislative Data Processing Center to Pennsylvania's more than 9000 election districts and certified as usable by the Legislative Reapportionment Commission ("LDP data"). *See* Affidavit of Kathy A. Sullivan (Tab J).

12. The LDP data are used for both legislative and congressional redistricting that may be required. *See id.*

13. The 2001 Legislative Reapportionment Commission was composed of the leaders of the Democrat and Republican Caucuses of the Senate and House of

the General Assembly of Pennsylvania and a chair appointed by the Pennsylvania Supreme Court. *See* PA. CONST. art. II, §17.

14. The LDP data are used by the Democrat and Republican Caucuses of the Senate and House of the General Assembly of Pennsylvania for purposes of congressional redistricting. *See* Affidavit of Kathy A. Sullivan (Tab J); Hearing Trans. I: 12-13, 36, 60-61, 78 (Testimony of Robert L. Priest at March 11, 2002 hearing).

15. When requested by a Caucus, the Legislative Data Processing Center provides a legal description and a per-district population to be used for consideration of the plan by the General Assembly. *See* Affidavit of Kathy A. Sullivan (Tab J).

16. During the General Assembly's consideration of a revised congressional districting plan that would correct the violation found by this Court on April 8, 2002, the Legislative Data Processing Center, using the same LDP data used for the Act 1 plan, prepared a legal description and a per-district population for plans developed by each Caucus. *See id.*

17. The legal description prepared for the Senate Majority Leader Brightbill (Senate Republican Caucus) showed that the boundary between South Buffalo Township in Armstrong County constituted a portion of the boundary between the 3rd and 12th Congressional Districts; the population per-district showed that 5 districts had a population of 646,372 and 14 districts had a population of 646,371. *See id.*

18. When Majority Leader Brightbill offered the Senate Republican Caucus plan as an amendment to HB 2545, the concerned congressional redistricting, he described it as containing a "zero" deviation plan. *See* LEGISLATIVE JOURNAL – SENATE (April 17, 2002) at 1653 (Tab I).

19. No member of the General Assembly, House or Senate, during consideration, challenged the Act 34 plan as failing to remedy the population deviation found by this court to violate the one-person, one-vote violation principle. *See* LEGISLATIVE JOURNAL – SENATE (April 17, 2002) at 1647-54 (Tab I); LEGISLATIVE JOURNAL – HOUSE (April 17, 2002) at 706-11 (Tab K).

20. The Legislative Data Processing Center has not been notified of any changes to election district boundaries since before the data were used to draw the Act 1 plan. *See* Affidavit of Kathy A. Sullivan (Tab J).

ISSUE BEFORE THIS COURT

21. On April 22, 2002, Plaintiffs asked this Court to take remedial action on the grounds that the Act 34 plan violated the one-person, one-vote principle because a deviation of 97 people existed between the largest and smallest Congressional Districts. *See* Docket Entry #150 and associated document.

22. Plaintiffs challenge to the Act 34 plan is based on a purported change to the location of the boundary between the two election districts of South Buffalo Township that was approved by the Armstrong County Court of Common Pleas on March 15, 2002. *Id.*

ARMSTRONG COUNTY SITUATION

23. On February 19, 2002, the Armstrong County Board of Elections, composed of the Armstrong County Commissioners, petitioned the Armstrong County Court for approval of a change to the boundary between the two elections districts of South Buffalo Township. *See* Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. (Tab L(1)).

24. None of the defendants in this matter were parties to the petition of February 19, 2002; in fact, no respondents were named on the petition of February 19, 2002. *See id.*

25. The Armstrong County Board of Elections had no authority, at that time, to seek a change to any election district boundary, *see* 25 P.S. §2746, and had no authority, at any time to seek to change a Congressional district boundary. *See* U.S. CONST. art. I, §4.

26. The Commissioner of the Bureau of Commissions, Elections and Legislation, on February 11, 2000, notified all county boards of election that Act No. 1999-51: "includes new restrictions for altering election districts. The Act provides that election districts may not be altered during the period from June 1, 2000 through April 30, 2002, although during the period from June 1, 2000 through December 31, 2000, election districts can be altered under certain circumstances." *See* Certification of Secretary of Commonwealth (containing the February 11, 2000 memo and a copy of Act 51 (HB 1981, PN 2628)) (Tab M).

27. The Armstrong County Board of Elections sought to change the boundary between the two election districts of South Buffalo Township in order that the Northpointe Industrial Park would be located entirely within the 12th Congressional District, rather than split between the 3rd and 12th Congressional Districts, although this is not mentioned in the February 19, 2002 Petition. *See* Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. (Tab L(1)); Certified Copies of Third-Party Petition & Answer thereto (filed in *Mellow v. Schweiker*, Pa. Cmwlth. Ct. No. 725 M.D. 2002) ("Third-Party Petition & Answer thereto") at ¶¶29, 31 (Tab N).

28. Northpointe Industrial Park, which was officially opened on October 18, 2001, is an extensive economic development project that is expected to provide 3,500 new jobs. *See* Biography of Congressman John Murtha (available on his official website – www.house.gov/murtha/bio/bio02.htm (Tab O); Third-Party Petition ¶28 & Answer thereto.

29. Congressman John Murtha, the senior member of Pennsylvania's Congressional delegation and the representative from the 12th Congressional District, was instrumental in obtaining federal grants for the development of Northpointe. *See* Biography of Congressman John Murtha (Tab O); Third-Party Petition ¶30 & Answer thereto (Tab N).

30. By order dated March 15, 2002, the Armstrong County Court approved the boundary change, which was unopposed. *See* Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. (Tab L(4)).

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.

32. The March 15, 2002 order does not address the impact of the change to the election district boundary on the boundary between the 3rd and 12th Congressional Districts. *See* Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. (Tab L(4)).

33. The Board, before filing the February 19 petition that sought approval of a change to the boundary between the two election districts of South Buffalo Township, did not obtain approval from the Secretary and, after the Armstrong County Court's purported approval, did not notify the Bureau of Elections, Commissions, Elections or the Legislative Data Processing Center of the change to the boundary between the two election districts of South Buffalo Township. Third Party Petition ¶36 and Answer thereto (Tab N); Affidavit of Sullivan (Tab J).

34. Presiding Officers were not aware of the change to the boundary between the two election districts of South Buffalo Township when the Act 34 was enacted. Inference from LEGISLATIVE JOURNAL – HOUSE (April 15, 2002) at 639-

62 (Tab P); LEGISLATIVE JOURNAL – HOUSE (April 17, 2002) at 706-11 (Tab K); LEGISLATIVE JOURNAL – SENATE (April 17, 2002) at 1647-54 (Tab I).

35. Upon learning of the boundary change, the Secretary informed the Armstrong County Board of Elections that it lacked authority to seek the boundary change and that it could not, in any event, effect a change to the boundary between congressional districts established in the Act 1 and Act 34 plans using the LDP data. *See* Third-Party Petition ¶37 & Answer thereto (Tab N).

36. Upon learning of the boundary change, the General Assembly passed SB 1240, PN 1972, which became Act No. 2002-44 ("Act 44") when signed by Governor Schweiker on May 16, 2002. *See* SB 1240 History (Tab Q) and SB 1240, PN 1972 (Tab R).

37. Act 44, among other things, amended Section 536 of the Pennsylvania Election Code, 25 P.S. §2746, to extend the prohibition on changes to election district boundaries from April 30, 2002 until "June 30, 2002, or until resolution of all judicial appeals to the 2002 Congressional Reapportionment Plan, whichever occurs later" and made such amendment retroactive. *See* SB 1240, PN 1972 (Tab R).

38. The Armstrong County Board of Elections, admitting its lack of authority to seek the boundary change, petitioned the Armstrong County Court, on May 8, 2002, to vacate the March 15, 2002 order. *See* Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. (Tab L (5)).

39. The Armstrong County Board of Elections held the May 21, 2002 primary election and November 5, 2002 general election for Congress in accordance with the pre-March 15, 2002 boundary between the two election districts of South Buffalo Township. *See* Third-Party Petition ¶39 & Answer thereto (Tab N).

40. None of the defendants in this matter were parties to the May 8, 2002 petition to vacate; in fact, no respondents were named on the petition of May 8, 2002. *See* Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. (Tab L(5)).

41. The Armstrong County Court, on July 29, 2002, denied the unopposed petition of the Armstrong County Board of Elections. *See* Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. (*In re Realignment of the Division Eastern and Western Precincts of the South Buffalo Township Election District*, No. 2002-0081-MISC.) (Tab L(7)).

42. The March 15, 2002 order was null and void because the Armstrong County Court, at the time it did so, lacked authority to seek a change to an election district boundary. Inference from Fact Nos. 23, 25, 26, 38.

43. The March 15, 2002 was not an adjudication. Inference from Fact Nos. 23, 24, 25, 26, 30, 38.

44. The March 15, 2002 order does not address the impact of the change to the election district boundary on the boundary between the 3rd and 12th Congressional Districts. Certified Copy of Armstrong County Court Docket and Docket Entries in No. 2002-081-Misc. (*In re Realignment of the Division Eastern and Western Precincts of the South Buffalo Township Election District*, No. 2002-0081-MISC.) (Tab L(4)).

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.

Boundaries of the Act 34 Plan

46. On December 9, 2002, Governor Schweiker signed SB 824, 2435 into law as Act No. 2002-150 ("Act 150"), which made numerous amendments to the

Pennsylvania Election Code. *See* Tabs S (SB 824 history) and T (SB 824, PN 2435 – Act 150).

47. Section 6.2 of Act 150 added a new section 506 to the Pennsylvania Election Code, which will be published at 25 P.S. §2706. *See* Tab T.

48. New section 506, titled "District boundaries," provides:

In administering elections for the nomination and election of candidates for the United States House of Representatives and the General Assembly, county boards of election shall adhere to the following rule: Where an election district is used in or pursuant to a congressional redistricting statute or the final plan of the Legislative Reapportionment Commission [the entity charged with redrawing state legislative boundaries following the federal decennial census] to define the boundary of a congressional district or state legislative 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. The boundaries of the Congressional districts, as established by statute, and state legislative districts as set forth in the final plan of the Legislative Reapportionment Commission 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.

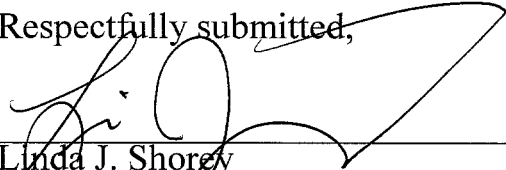
49. According to section 21 of Act 150, section 506 became effective on the date it was signed into law. *See* Tab T.

50. Section 506 will require that for any election conducted under the Act 34 plan, the boundary between the 3rd and 12th Congressional Districts in South Buffalo Township will be the pre-March 15, 2002 election district (precinct) boundary, i.e., the same boundary used by Armstrong County in conducting the May 21st and November 5th Congressional elections under Act 1. Section 506 of the Pennsylvania Election Code, to be published at 25 P.S. §2706 (Tab T).

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.

Respectfully submitted,

December 20, 2002



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I certify that on December 20, 2002, I caused a copy of the foregoing Statement of Material Facts to be served on the following as indicated:

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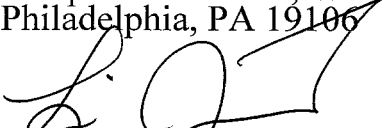
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