(125)
3-18-
SC

ORIGINAL

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

RICHARD VIETH, et al, Plaintiffs,	:	
v.	:	No. 3:CV-01-2439
	:	(Judges Nygaard, Rambo & Yohn)
THE COMMONWEALTH OF PENNSYLVANIA, et al. Defendants.	:	

POST-HEARING BRIEF FOR DEFENDANTS LIEUTENANT GOVERNOR JUBELIRER AND SPEAKER RYAN

Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Defendants Jubelirer and Ryan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

CONSTITUTIONS

STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

PROCEDURAL HISTORY

On March 11-12, 2002, the three-judge court (Nygaard, C.J., Rambo and Yohn, D.J.) held a hearing on the sole remaining claim - Plaintiffs' challenge to Act No. 2002-1 ("Act 1") under the principle of one-person, one-vote. This Court, from the bench, directed the parties to file proposed findings of fact and conclusions of law and a post-hearing brief by 4PM Friday, March 15, 2002.

STATEMENT OF FACTS

For their statement of facts, Presiding Officers incorporate their proposed findings of fact.

STATEMENT OF QUESTIONS INVOLVED

1. Whether Plaintiffs failed to establish that the General Assembly did not make a good faith effort to minimize the population deviation within the congressional districts established by Act 1.

Suggested answer: YES.

2. If this Court concludes that Plaintiffs met their burden of proof and showed that the General Assembly did not make a good faith effort to minimize the population deviation of Act 1, whether Defendants justified the deviations among districts.

Suggested Answer: YES

3. If this Court concludes that the answers to questions 1 and 2 are NO, whether the General Assembly must be provided with an opportunity to enact another congressional redistricting plan.

Suggested Answer: YES

4. If this Court concludes the answers to questions 1, 2 and 3 are NO and that it is permissible for this Court to impose a congressional redistricting plan on the Commonwealth until, or in anticipation of the possibility of failure of the

General Assembly to act, whether the Court must choose the plan with the lowest population deviation that most closely tracks the legislative goals of Act 1.

Suggested Answer: YES

5. Whether the expert testimony of Dr. Allen Lichtman and Larry Ceisler should be accorded no weight because it is not relevant to the one-person, one-vote issue before the Court; whether the expert testimony of Dr. Allen Lichtman must be struck because no foundation was provided for the data which he used to perform his analysis; and whether large portions of testimony by Larry Ceisler and Congressman Mascara must be excluded as inadmissible hearsay.

Suggested Answer: YES

ARGUMENT

I. THE PRINCIPLE OF ONE-PERSON, ONE-VOTE

In *Karcher v. Daggett*, the U.S. Supreme Court identified [t]he "two basic questions [that] shape litigation over population deviations in state legislation apportioning congressional districts." 462 U.S. 725, 730 (1983). The Court separated the questions into two prongs as follows:

> First, the court must consider whether the population differences among the districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Id. at 730-31 (citing *Kirkpatrick v. Preisler*, 394 U.S. 530-31 (1969)).[1]

[1] Presiding Officers recognize that this Court is bound by *Karcher*. However, should this Court's decision be appealed, Presiding Officers reserve the right to argue that there is a *de minimis* deviation under which a congressional redistricting plan enacted by a state legislature should be accorded a presumption of compliance with the one-person, one-vote principle.

A. Prong One – Lack of Good Faith Effort

1. Standard

To show the lack of a good faith effort to reduce population deviation where a duly-enacted plan is being challenged, a plaintiff cannot simply produce a plan that was written on a *tabula rasa.* Modern computer technology can be used to create any number of plans that might have a zero deviation, but that would be nothing more than abstract exercises in aggregating population units. For example, a plaintiff ought not to be able to meet her burden of proof by offering a computer-generated zero-deviation plan that mapped congressional districts either as concentric circles emanating from the center of the state or as vertical or horizontal stripes across the state. Such a plan would be a meaningless exercise, absent evidence that it also tracks the political goals of the legislature to the extent possible while curing the deviation. To accept such an abstract plan as meeting the first prong of *Karcher* would reduce the test to a simple exercise in transferring the results of long division onto a map.

As a review of *Karcher* and relevant case law shows, a plaintiff should have to demonstrate either that a plan that was before the legislature had a lower population deviation than the enacted plan or, that the plaintiff's proferred zero-eviation plan is itself a good-faith, feasible proposal that had a realistic chance of enactment, i.e. that it tracks the constitutionally permissible political goals of the legislature as much as possible while curing the deviation. Applying *Karcher* in this way will continue to promote legislative attention to constitutional goals while discouraging the extra-legislative creation of abstract plans for use as a wedge to open the courtroom door to litigation by political opponents. It will also assure that, if a case arises in which private plaintiffs genuinely care about population deviation rather than about partisan politics, they will be able to obtain a remedy that meets their stated interests, without dragging the courts into political debate.

In *Karcher*, the Court noted that "several other plans introduced in the 200th Legislature had smaller maximum deviations than the [enacted] Feldman Plan." 462 U.S. at 738. In response to an objection that "the alternative plans considered by the District Court [i.e., the other plans before the Legislature] were not comparable to the Feldman Plan because their political characters differed profoundly," the Court responded:

> We have never denied that apportionment is a political process, or that state legislatures could pursue legitimate secondary objectives as long as those objectives were consistent with a good-faith effort to achieve population equality at the same time. Nevertheless, the claim that political considerations require population differences among congressional districts belongs more properly to the second level of judicial inquiry in these cases, ... in which the State bears the burden of justifying the differences with particularity.
>
> In any event, it was unnecessary for the District Court to rest its finding on the existence of alternative plans with radically different political effects. As in *Kirkpatrick*, 'resort to the simple device of transferring entire political subdivisions of known population between contiguous districts would have produced districts much closer to numerical equality.' 394 U.S. [ ] at 532. Starting with the Feldman Plan itself and the census data available to the legislature at the time it was enacted, ... one can reduce the maximum population deviation of the plan merely by shifting a handful of municipalities from one district to another... . Thus the District Court did not err in finding that the plaintiffs had met their burden of showing that the Feldman Plan did not come as nearly as practicable to population equality.

Id. at 739.

In *Stone v. Hechler*, 782 F. Supp. 1116 (W.D. W. Va. 1992), the three-judge court explained, with respect to the first *Karcher* prong, that

> Under Karcher, plaintiffs satisfy their burden under the first prong if they demonstrate that the population deviations among the congressional districts under West Va. Code §1-2-3 [the duly-enacted plan] could have been reduced or eliminated *by the adoption of a different plan that was before the Legislature when it enacted West Va. Code §1-2-3*. Because seventeen other plans with a lower overall variance were before the Legislature during its regular and special session, the Court concludes that Stone has satisfied his burden.

Id. at 1126 (emphasis added).

In *Anne Arundel County Republican Central Committee v. State Advisory Bd. of Election Law*, 781 F. Supp. 394 (D. Md. 1991), *aff'd* 504 U.S. 938 (1992),

the three-judge court summarily concluded that that because there was a plan before the legislature, H.B. 22, "with a smaller numerical deviation from absolute equality [average deviation of 2.49 people], plaintiffs have proved that H.B. 10's deviations did not result from an unavoidable good faith effort to achieve population equality." *Id.* at 396.

The decision of the three-judge court in *Nerch v. Mitchell*, 3:CV-92-0095 (issued Aug. 13, 1992) (Stapleton, C.J., Rambo & Pollak, D.J.) does not support Plaintiffs' belief that they carry their burden in this case simply by pointing to a *tabula rasa* map. *Nerch* was not a challenge to a duly-enacted legislative plan, but rather, to the congressional redistricting plan adopted by the Pennsylvania Supreme Court in 1992. A court-drawn plan is not entitled to the same deference as one that has been enacted by a legislature. *See Bush v. Vera*, 517 U.S. 952, 978 (1996) (states retain a flexibility that courts lack when fashioning redistricting plans); *Connor v. Finch*, 431 U.S. 407, 415 (1977) (when courts undertake the task of redistricting, a court-drafted plan is subject to greater scrutiny because courts "lack the political authoritativeness that the legislature can bring to the task.").

2. Application

To meet their burden under *Karcher*, Plaintiffs offered a congressional redistricting plan, denoted "Alternative ("Alt") 4" or the "zero deviation" plan, which was not before the General Assembly and was created after the enactment of Act 1.[2] *See* Hearing Transcript ("Tr.") Vol. I: 6 (24-27), 9 (11-14) (opening

[2] It is not disputed that using the 2000 Census population data adjusted by the Legislative Data Processing Center ("LDPC") (a non-partisan legislative agency) for use by the General Assembly and the 2001 Legislative Reapportionment Commission for legislative and congressional redistricting (adjusted population data)in Pennsylvania shows that Act 1 has a total population deviation of 19 individuals. *See* Dft. Ex. 12. Presiding Officers twice offered as Defendants' Exhibit 54 a certified copy of the adjusted population data used to create Act 1, as testified to by Plaintiffs' cartographer Robert Priest, by Plaintiffs to create Alt. 4, Tr. Vol. I: 12 (18) – 13 (8) (Priest)). Tr. Vol. III: 94, 96-97 (Krill). However, this Court sustained Plaintiffs' objection to its admission. Tr. Vol. III: 97(Nygaard, J).

statement of Paul Smith); Tr. Vol. I: 25-28 (Priest); Plt. Ex. 3, 4. Alt 4 was purported to have a population deviation of zero or one. Tr. Vol. I:25 (9-11) (Priest). Plaintiffs made no attempt to lower the population deviation of Act 1. Tr. Vol. I:74 (18 – 20) (Priest). Plaintiffs offered no evidence that there was a plan with a population deviation lower than 19 before the General Assembly during its consideration and, as the legislative history of Act 1 shows, no such plan was considered by the General Assembly. *See* Tr. (in toto); Plt. Ex. 1-22; Dft. Ex. 1-18.

Plaintiffs, moreover, can point to nothing to show that their zero deviation map would have been seriously considered by the General Assembly. No member of the General Assembly ever tried to put the zero deviation map before the legislature, even though it was drafted by the House Democratic staff for the Minority leader, Rep. DeWeese.[3] Instead, Rep. DeWeese tried to get the House to suspend its rules to consider a quite different plan. *See* Tr. Vol. I:64(9) –65(12) (Priest); LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 13 (Dft. Ex. 2). The Court may infer that Rep. DeWeese may have known that the zero deviation map would be "dead on arrival" on the floor of the House. The unacceptability of such a plan may have had nothing whatsoever to do with its population deviation, but perhaps due to its own unique political geography. The Plaintiffs' zero deviation plan, for example, creates a district that sprawls across the southern border of Pennsylvania in the shape of a dead bison, including the residence of two freshman Republican incumbents (Rep. Shuster in its foreleg and Rep. Platts at the end of its tail).[4]

---

[3] The version of the zero deviation map produced in court was two iterations removed from the initial draft which could have been introduced during debates on SB 1200. Tr. Vol. I:63 (Priest).

[4] The Court should not encourage the reservation of zero deviation plans kept secret during the legislative process to later be sprung upon the courts by factions of the General Assembly whose own plans did not prevail in the political process. Requiring some showing of serious legislative consideration or at least political feasibility in a zero deviation plan would discourage this practice. In this instance,

Plaintiffs, moreover, have provided no legal description for Alt 4. As Plaintiffs' cartographer admitted, it is the legal description that is controlling as to what constitutes the boundaries of a plan. Tr. Vol. I:53 (1-17) (Priest). This is demonstrated by a review of Act 1 (Dft. Ex. 53) and Appendix A of *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) (Appendix A showing legal description of court-ordered 1992 plan). The legal description of Alt 4 (Plt. Ex. 4A) does not result in a zero deviation plan, but rather a plan with a total population deviation of almost 5000 individuals. *See* Tr. Vol. I:56 (10), 61 (9) (Priest). As a result of the testimony showing that the legal description of Alt 4 did not show a zero deviation plan, Plaintiffs withdrew Ex. 4A. Tr. Vol. I:79 (Smith). Accordingly, since there is no legal description for Alt 4 before this Court, Alt 4 should not be considered by this Court for any purpose, further illustrating Plaintiffs' failure to meet their burden under the first prong of *Karcher*.

Contrary to Plaintiffs' suggestion, Act 1 was a good faith effort by the General Assembly to minimize the population deviations in drawing a congressional redistricting plan. In the first instance, the total population deviation of 19 individuals calculates to a 0.00% deviation (and the deviation of each of the 16 non-"ideal" districts is even lower). While *Karcher* concludes that there is no *de minimis*, i.e., safe harbor, deviation, the Supreme Court has not ruled out a conclusion that a 0.00% deviation is *per se* constitutional.

Even more important, however, is the legislative history of Act 1. On December 10, 2001, the Senate considered amendments to SB 1200 offered by Senator Brightbill and by Senator O'Pake. *See* LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) (Dft. Ex. 2). Senator Brightbill explained that for the amendment he was offering (A4818), "[t]here is a deviation of about 11 or 12 persons per

---

it appears that Rep. DeWeese may have realized that members of his Caucus would be willing to support a Republican-drawn plan and held back from consideration the plan that evolved into Alt 4 so that it could be honed for presentation in court.

district, so there is virtually no district-by-district deviation ... ." *Id.* at 1193-94. Senator O'Pake, on the other hand, explained that for the amendment he was offering (A4552, which was the same as SB 1241), "the maximum deviation is 146. This is total, of course ... . I am told that the absolute range would be from 87 below to 59 above." *Id.* at 1210. The Senate agreed to Senator Brightbill's amendment by a 27-22 vote, *id.* at 1206, and rejected Senator O'Pake's amendment by a 27-22 vote. *Id.* at 1211. Thus, the version of SB 1200 passed by the Senate (PN 1621) had a total population deviation of 24.

During the House's third consideration of SB 1200 PN 1621, Representative Perzel (R) offered amendment A4858. LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 1 (Dft. Ex. 3). The House passed SB 1200 with the Perzel amendment (PN 1627) by a 142 – 56 vote, with 53 Democrats voting for the bill. LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 17-18 (Dft. Ex. 3). The total population deviation for the version of SB 1200 passed by the House was 19. LEGISLATIVE JOURNAL – HOUSE (Jan. 3, 2002) at 15 (Rep. Perzel explaining that "our deviations on this map range from plus 9 to a minus 10 from the largest to the smallest of districts. That is a range of 19"). As this history shows, the General Assembly explicilty favored plans with lower population deviations.

After the Senate declined to concur in the House amendment to SB 1200, a team of legislative cartographers attempted to minimize population deviation while keeping precinct splits to a minimum. Tr. Vol. III:298 (Memmi). The cartographers first moved as many whole precincts as could be located in the time available for the task, managing through that process to "zero" three districts, but a total population deviation of 1,134 remained. Tr. Vol. III: 297, 321 (Memmi); Dft. Ex. 98. The cartographers next evaluated the census blocks in the precincts on the boundaries of the districts and made adjustments by moving census blocks between congressional districts. Tr. Vol. III: 297, 321-22 (Memmi). The cartographers

managed, through that process, to achieve a total population deviation of 19, with slight deviations in 16 of the 19 districts as illustrated in the following table:

Congressional District	Population	Deviation from "Ideal"
1	646,361	-10
2	646,361	-10
3	646,464	-7
4	646,375	4
5	646,371	0
6	646,375	4
7	646,380	9
8	646,371	0
9	646,379	8
10	646,374	3
11	646,372	1
12	646,369	-2
13	646,375	4
14	646,378	7
15	646,376	5
16	646,368	-3
17	646,361	-10
18	646,369	-2
19	646,375	4

Tr. Vol. III: 309 (Memmi); Dft. Ex. 98.

The cartographic team stopped work when they had achieved this miniscule deviation, concomitant with splitting only 6 out of 9427 voting precincts in Pennsylvania, while tracking the political compromise that the Conference Committee appointed by the two chambers had reached. The cartographic team's work was finally enacted as Act 1. Together with the attention to population deviation in the floor debates and votes, the cartographic team's apolitical dedication to the tedious task of finding precinct and census blocks to trade to

minimize both deviation and splits evinces a good faith effort that more than satisfies *Karcher.*

B. Prong two - Justification

1. Standard

Should the Court conclude that Act 1 was not the product of a good-faith effort by the General Assembly to achieve population equality, the burden shifts to the Defendants "to prove that the population deviations in [the] plan were necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740. As the Court explained in *Karcher*,

> The showing required to justify population deviations is flexible depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.

Id. at 741. Any number of "consistently applied" and nondiscriminatory legislative policies might justify some variance in population deviation. *Id.* at 740.

As noted in *Karcher*, when a court is faced with a challenge to a duly-enacted congressional redistricting statute, and the possibility of remedial action, it "must defer to the legislative judgment the plan[] reflect[s]." *Upham v. Seamon*, 456 U.S. 37, 41 (1982), *rehearing denied*, 456 U.S. 938 (1982) (reversing a court-ordered plan that failed to give proper deference). In the context of the instant case, where the alleged maximum population deviation (19 people) is miniscule, the policies embodied in the location and shape of the districts in Act 1 are entitled to significant deference.

Deference was applied by the three-judge courts in both *Stone* and *Anne Arundel County* in addressing the second *Karcher* prong. In *Stone*, the court began by noting that the "State relies upon two legitimate goals to justify the population variances in West Va. Code §1-2-3: preserving the cores of previous districts and

maintaining district compactness. This Court therefore must determine whether these goals justify the population variations in West Va. Code §1-2-3 and whether the goals and the manner in which they are achieved satisfy Karcher." *Id.* With respect to preserving cores, the court commented:

> The Supreme Court, while stating that preserving cores of prior districts is a legitimate goal that may justify population variances, has not stated what constitutes a district core. That Court, in counseling deference to state legislative bodies, however, has made it clear that 'redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.' Wise v. Lipscomb, 437 U.S. 535, 538 (1978).
>
> We think that principle has application here. There is merit to the arguments of both Stone and the State concerning how to reduce the concept of "core" to definitional practicability. The State Legislature, however, considered both arguments and chose the one now advanced by the State in this litigation, that preserving district cores means keeping as many of the current congressional districts intact as possible.
>
> If the Legislature's reasoning suffered from a fundamental flaw or was unsubstantiated by any factual support, we would be slow in deferring to its judgment. We have found, however, that there is a reasonable factual basis for its conclusion that Plan II [the duly-enacted plan] better preserves the cores of prior districts than any of the sixteen viable Plans and we cannot say that its reasoning is grounded other than on pursuing a policy which in the Legislature's judgment would benefit its constituency.

Id. at 1126-27. With respect to compactness, the court concluded:

> ... We think it has been adequately demonstrated that each legislative body kept the concept of compactness as a principal goal of its redistricting efforts and did this primarily in pursuit of fulfilling its State constitutional obligations. The fact that there were other Plans that would be deemed more compact that [sic] Plan II under the three tests employed by the experts does not detract from the Legislature's effort. In the legislative view, the districts in Plan II were compact under the West Virginia Constitution, and in weighing that and as the legislature viewed the requirement other legitimate legislative goals it was acting preeminently in a role reserved to a state legislature by the United States Supreme Court.

Id. at 1127 (citation omitted). The court concluded: "the State has met its burden of showing legitimate justification for the variances by demonstrating that the Legislature in designing and enacting Plan II was guided in large part by its pursuit

of the legitimate State goals of preserving as many of the cores of prior districts as possible and in obtaining the greatest degree of compactness practicable that is also consistent with its goal of preserving the cores of previous districts." *Id.*

In *Anne Arundel County*, the court commented: "It is under Karcher's second prong that we now consider the relatively insignificant mathematical deviations in this case. We note that the amount and degree of justification which the State must establish is roughly equatable to the deviation itself. In that light, we consider the aims of the State of Maryland which have caused it to enact the particular congressional redistricting plan before us." *Id.* at 397. The court discussed the justifications:

> Both in the evidence presented and in oral argument, the State has set forth several convincing, consistent, and legitimate justifications for the numerical deviations within H.B. 10. These include: (1) keeping intact the three major regions that surround the center of the state ..., (2) creating a minority voting district, and (3) recognizing incumbent representation with its attendant seniority, in the House of Representatives. ... We conclude that these justifications, which the State alleges are properly within the ambit of a state legislature's redistricting latitude and designed to achieve legitimate state goals, are sufficient to warrant the very small numerical variance among the congressional districts seen here. The analysis mandated by the Supreme Court cases applying Art. I, §2 is, therefore, satisfied.

Id.

2. Application

In terms of justification, this case has many similarities to that before the three-judge court in *Anne Arundel County*. In that case, the duly-enacted legislative plan had a total population deviation of 10 individuals. The three-judge court, after noting that the deviations present were "relatively insignificant" and that the "amount and degree of justification which the State must establish is roughly equatable to the deviation itself," concluded that the deviation was justified, explaining

> Both in the evidence presented and in oral argument, the State has set forth several convincing, consistent, and legitimate justifications for

> the numerical deviations within H.B. 10. These include: (1) keeping intact the three major regions that surround the center of the state (specifically, the Eastern Shore, Southern and Western Maryland), (2) creating a minority voting district, and (3) recognizing incumbent representation, with its attendant seniority, in the House of Representatives. We also conclude that these justifications, which the State alleges are properly within the ambit of a state legislature's redistricting latitude and designed to achieve legitimate state goals, are sufficient to warrant the very small numerical variance among the congressional districts seen here.

781 F.Supp. at 387 (citations omitted). The third justification included the need to draw a safe seat for Representative Hoyer, "the fourth ranked Democratic member of the United States Congress." *Id.* at 409.

As with Representative Hoyer, significant support for creating a "safe" seat for Congressman Murtha, the "dean" of Pennsylvania's Congressional Delegation, is apparent in the legislative history of Act 1. *See e.g.* 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); LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 5, 14 (Rep. DeWeese), 10 (Rep. Rooney). Congressman Mascara testified that the General Assembly had been responsive to Congressman Murtha's requests concerning his district and that Congressman Murtha was satisfied with his district under Act 1. *See* Tr. Vol. III: 267 (Mascara). Representative Perzel informed the members of the House that compromise reached by the Conference Committee satisfied Congressman Murtha. LEGISLATIVE JOURNAL – HOUSE (Jan. 3, 2002) at 15 (Perzel) (Dft. Ex. 4). Creating a safe seat for Congressman Murtha in District 12 provides a reasonable justification for the deviations in District 12 and the four districts that abut it – Districts 3, 4, 9, & 18.

Similar to the second justification listed by the court in *Anne Arundel County* is the General Assembly's expressed desire to maintain minority-majority districts in Districts 1 and 2 in the Philadelphia area. *See* LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1196 (Mellow), 1199, 1210 (Brightbill), 1210 (O'Pake);

LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 10-11 (Perzel and Thomas), 13, 14 (Perzel), 16 (Thomas); LEGISLATIVE JOURNAL – SENATE (Jan. 3, 2002) at 11 (Kitchen), LEGISLATIVE JOURNAL – HOUSE (Jan. 3, 2002) at 15 (Perzel) (Dft. Ex. 2, 3, 4, 5). Maintaining the minority-majority districts in Districts 1 and 2, given the population loss in Philadelphia County, provides justifications for the deviations in Districts 1 and 2 and the districts abutting them –Districts 6, 7, & 13.

The most compelling justification, however, and the one that, by itself, serves to justify the deviations in each of the 16 districts that has a slight population deviation, is the avoidance of precinct splits. As one of the cartographers for Act 1 testified, avoiding precinct splits was a constant in the cartographers' task of minimizing the population deviation in Act 1. Tr. Vol. III: 295-298 (Memmi). The cartographers approached the task of minimizing population deviation by first inspecting election precincts. Tr. Vol. III: 296-97 (Memmi). This process resulted in three districts with a population of deviation of 0 or 1 but a total population deviation of 1,134. Tr. Vol. III: 321 (Memmi); Ex. 98. The cartographers then moved to the census blocks and made adjustments that enabled them to reduce the population deviation to 19, while only splitting six precincts. Tr. Vol. III: 322 (Memmi); Ex. 98.

In preparation for the hearing before this Court, Dr. Memmi, one of the Act 1 cartographers, was asked to try to "zero" Act 1. Tr. Vol. III, 299-300 (Memmi). The result of this exercise was a plan which had 14 districts with a deviation of zero and 5 districts with a deviation of one. The tradeoff, however, was quadrupling the number of precinct splits from 6 to 26, doubling the number counties with precinct splits from 6 to 12, almost tripling the number of municipalities affected by split precincts and increasing the congressional districts similarly affected to 17. Tr. Vol. III: 305 (Memmi); Dft. Ex. 98.

There are very practical reasons for the General Assembly's desire to avoid precinct splits. As Dennis Marion, County Administrator for Cumberland County testified, splitting precincts creates: (1) additional costs and work for county election officials in all counties where they occur: (2) the potential for voter confusion wherever they occur; and (3) the potential for candidate confusion wherever they occur. Tr. Vol. III, 342-45, 349, 350-353 (Marion). These justifications are legitimate and uniformly applied where applicable. As was noted ten years ago in *Nerch*:

> This is not a case presenting the issue of whether a very small, unjustified maximum deviation renders a redistricting plan constitutionally infirm. This is a case in which a state has made a good faith decision to accept a very small departure from the ideal in order to serve an important countervailing interest. ...
>
> The Karcher Court indicated that when the burden passes to the state to justify deviations, its "legitimate goal" must be shown to justify each '*significant* variance.' Karcher, 462 U.S. at 730-31 (emphasis added). We are satisfied that the Pennsylvania Supreme Court's plan represents a good faith effort to serve two legitimate and important countervailing interests it identified –the creation of a second 'minorit in the majority' district, the avoidance of municipal splits –without causing any significant dilution in the vote of any citizen. Accordingly, we refuse to find that plan constitutionally infirm because the maximum deviation could be reduced to a degree having no practical significance.

Nerch, 3:CV-92-0095 (issued Aug. 13, 1992) at 36. The total population deviation in *Nerch* was approximately 3 times that present here. The maintenance of two minority-majority districts is equivalent to the important interest present in *Nerch* of creating a second minority-majority district. The avoidance of precinct splits is equivalent to the important interest present in *Nerch* of avoiding municipal splits. Both of these goals were accomplished without "any significant dilution in the vote of any citizen." As in *Nerch*, this Court should "refuse to find" Act 1 "constitutionally infirm."

In his opening statement, Plaintiffs' counsel explained that Plaintiffs would rebut any justification presented by Defendants for the 19-person deviation by

presenting evidence that "the actual motivation of Act 1 [] is partisan –biased partisan unfairness achieving and maximizing the Republican advantage." Tr. at 9 (Smith). *See* also Plaintiffs' Trial Brief at 7-8. However, this Court has dismissed Plaintiffs' partisan gerrymandering claim for failure to state a claim on which relief could be granted. *See* February 22, 2002 Order. If any alleged partisan bias is not unconstitutional, then it is necessarily constitutional and does not provide a basis for invalidating legitimate justifications advanced in support of minimal populations deviations in a congressional redistricting plan. *See Hunt v. Cromatie*, 526 U.S. 541, 551 (1999) ("Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering.").

Plaintiffs argument was advanced, and rejected, by the majority in *Anne Arundel County*. After determining that the 10-person population variation in Maryland's 1991 congressional redistricting statute was justified, the majority refuted the position advanced by the dissent that "any redistricting plan that was in any way affected by considerations that could be labeled 'political'" was unconstitutional. *Id.* The court explained its disagreement with the dissent:

> In this case, this Court defers to Maryland's legislature. The evidence, as the dissent states, shows that the General Assembly, inter alia, aimed to give Congressman Hoyer, a congressman with high ranking and importance in the federal House of Representatives, a 'safe seat,' to provide the majority black population in an area of Prince George's and Montgomery counties with a chance to choose a representative without requiring that person to run against a strong incumbent such as Congressman Hoyer, and to provide certain opportunities for Congresswoman Bently and Congressman Cardin. ... The reelection of incumbents as such was not listed specifically by Justice Brennan in Karcher as an example of an affirmative legislative justification sufficient to meet Karcher's second prong, though recognized in White v. Weiser. Neither is the establishment of a majority black district listed specifically in Karcher, but 'preserving the strength of racial minority groups' is discussed. These aims, however, are clearly within Karcher's ambit. While Justice Brennan there concluded that the District Court's finding of a lack of causal connection between racial voting aims and the redistricting plan at issue was not 'clearly erroneous,' the sense of Karcher strongly suggests that if, as here, such a causal connection does exist, such aims can constitute an appropriate Karcher second-prong basis.

> We also note that the 'neutral criteria' redistricting called for by the dissent would in no way ensure maintenance of the territorial integrity of Anne Arundel County, which is what brought on this suit in the first place. Rather, adoption of the dissent's position would potentially subject every congressional district in the United States to novel constitutional scrutiny. Furthermore, to mandate that a legislature reapportion with regard merely to 'neutral criteria' (except for the dictates of the Voting Act and the Fifteenth Amendment) is to give the legislature, in practice, no guidance at all. Indeed, it virtually guarantees that a federal court, in a sort of judicial receivership, will ultimately conduct redistricting –a process the Supreme Court has consistently recognized as political.

Id. at 398-99 (citations omitted).

As the majority in *Anne Arundel County* stresses, redistricting is a "political" process. So long as the legislative goals are legitimate, i.e., constitutional, those goals, even if they include a bias in favor of the party in control, cannot provide a basis to invalidate a plan under the pretext that partisan bias somehow nullifies legitimate justifications.[5] Moreover, as discussed below in Argument Section III.A., Plaintiffs failed to prove partisan bias.

II. PERMITTED REMEDIAL ACTION

A. Opportunity To Enact New Plan

If this Court should find Act 1 unconstitutional because it violates the principle of one-person, one-vote, it must give the General Assembly a reasonable amount of time to enact a new plan. As the Supreme Court stressed in *Wise v.*

---

[5] The majority in *Anne Arundel County*, in rejecting the argument that the *Karcher* analysis involves more than mere numbers, but also takes into account the influence of "political" considerations in a redistricting plan, also noted that *Karcher* did "little to prevent what is known as gerrymandering," and explained:

> Of course, nothing prevents the plaintiff/opponents of a redistricting plan from challenging that plan on constitutional grounds either inside or outside of Art. I, §2. Any prohibited classification of or distinction among 'the people' is still cognizable, for example under the rubric of the First and Fourteenth Amendments. *See, e.g., Davis v. Bandemer*, 478 U.S. 109 ... (1986). The protections provided within Art. 1, § 2 speak for themselves.

Id. at 397-98.

Lipscomb, 437 U.S. 535, 540 (1978): "When a federal court declares an existing apportionment scheme unconstitutional, it is therefore appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *See also White v. Weiser*, 412 U.S. 783, 795 (1973) (internal quotation and citation omitted) ("reapportionment is primarily a matter for legislative consideration and determination."); U.S. CONST. art. I, § 4, cl. 1 (grant of authority to the state legislature to set the manner of congressional elections).

Even in the *Karcher* decisions, which Plaintiffs' relied on in their pre-trial memorandum, the three-judge court permitted the New Jersey Legislature an opportunity to enact a new plan following the invalidation of the existing one. *See Daggett v. Kimmelman*, 535 F.Supp. 978, 983 (D.N.J. 1982) (declaring P.L. 1982, cl. 1 unconstitutional under the principle of one-person, one-vote and directing: "The legislature will have until March 22, 1982 to enact a new constitutional plan for reapportionment. If one is not forthcoming, this court will convene on March 26, 1982 to undertake further proceedings."); *see also* 580 F.Supp. 1259 (D.N.J. 1984) (upon remand from the Supreme Court, the three-judge panel issued an order on December 19, 1983, fixing "February 3, 1984 as the date by which New Jersey could enact a constitutional congressional redistricting plan").

It is the rule rather than the exception for courts to give the state legislature a reasonable opportunity to enact a new plan. For example, in *Doulin v. White*, 528 F.Supp. 1323 (E.D. Ark. 1982), the three-judge court, after finding the Arkansas congressional redistricting scheme in violation of the principle one-person, one-vote, gave the state legislature 31 days to act. Like Plaintiffs here, the plaintiffs in *Doulin* urged the court "to order that their plan ...[be put] into effect," but the court rejected the request, explaining:

> The plaintiffs' plan was not considered by the General Assembly, or even conceived of at the time of the regular session. It would have a "very different political impact," *White v. Weiser,* [] from Act 965 [i.e., the invalidated plan]. ... The General Assembly could of course adopt the plaintiffs' plan if it wishes, but we will not do so, at least in the first instance. The Legislature should be given a chance to adopt a new plan.

Id. at 1332.

While Plaintiffs asserted in their Trial Brief at Section II.A that "[t]here is virtually no likelihood that the General Assembly would be able to create a new plan in time to allow the normal electoral processes leading up to the May 21 primary," they offered no evidence at the hearing to support their claim. That the General Assembly did not enact Act 1 until January 3, 2002 is irrelevant. The circumstances which would now face the General Assembly should the congressional redistricting plan be invalidated would be entirely different than those leading up to Act 1. For example, the General Assembly, through the enactment of SB 1200, vetted a number of legislative goals and arrived at a compromise that was acceptable to a majority of the members of both chambers, which in the House included 42 members of the Democrat Caucus. There is no basis to conclude that the General Assembly would not act promptly.

B. Adoption Of Plan That Tracks Act 1

1. Standard

Should this Court invalidate Act 1, determine not to provide the General Assembly with a reasonable opportunity to enact a new plan, and proceed to consider a court-ordered plan, it must adopt the congressional redistricting plan that most closely tracks the plan adopted by the Pennsylvania General Assembly. *See White v. Weiser*, 412 U.S. at 794-95. State legislatures have "primary jurisdiction" over reapportionment. *See id.* at 795; U.S. CONST. art. I, §4, cl. 1 (grant of authority to the state legislature to set the manner of congressional elections).

In *White*, the Supreme Court reversed the imposition of a remedy by the three-judge court. After finding the congressional redistricting plan adopted by the Texas legislature invalid under the principle of one-person, one-vote, the lower court had chosen between two alternative plans: Plan B (which most closely resembled the plan found unconstitutional) and Plan C (a plan that disregarded the districts drawn by the legislature). *See* 412 U.S. at 796. The three-judge court selected Plan C, because it was "based solely on population and is significantly more compact and contiguous than either S.B. 1 [the invalidated plan] or Plan B ... ." *Id.* at 794. The Supreme Court reversed, explaining:

> S.B. 1, a duly enacted statute of the State of Texas, established the State's congressional districts with locations and configurations found appropriate by the duly elected members of the two houses of the Texas Legislature. As we have often noted, reapportionment is a complicated process. Districting inevitably has sharp political impact and inevitably political decisions must be made by those charged with the task. Here those decisions were made by the legislature in pursuit of what were deemed important state interests. Its decisions should not be unnecessarily put aside in the course of fashioning relief appropriate to remedy what were held to be impermissible population variations between congressional districts.

Id. at 795-96. The Supreme Court further explained that the three-judge court had erred in implementing a plan that ignored the state's "legislative districting policy:"

> Given the alternatives, the court should not have imposed Plan C, with its very different political impact, on the State. It should have implemented Plan B, which most clearly approximated the reapportionment plan of the state legislature, while satisfying constitutional requirements.

Id. at 796. *See also In re Pennsylvania Congressional Districts Reapportionment Cases*, 567 F. Supp. 1507, 1512 (M.D. Pa. 1982) (three-judge court) ("However, when faced with choosing between two alternative plans, the Court [in *White*] adopted the plan that followed the general outline of the rejected state statute.").

The Supreme Court reaffirmed the principles of *White* in *Upham v. Seamon*, 456 U.S. 37 (1982). In *Upham*, after finding the congressional redistricting plan unenforceable due to the objection raised by the Attorney General, the three-judge

court had redrawn the districts in Dallas County. Appellants contended that the three-judge court erred in doing so because it "simply substituted its own reapportionment preferences for those of the state legislature." *Id.* at 40. The Supreme Court agreed and reversed the three-judge court, explaining:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the States, as expressed in statutory and constitutional provisions in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'

Upham, 456 U.S. at 41-42 (quoting *White,* 412 U.S. at 794-95). The Court went on to explain:

> We reached a similar conclusion in *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971), in which we held that the District Court erred in fashioning a court-ordered plan that rejected state policy choices more than was necessary to meet the specific constitutional violations involved. Indeed, our decision in *Whitcomb* directly conflicts with the lower court's order in this case. Specifically, we indicated that the District Court should not have rejected all multi-member districts in the State, absent a finding that those multimember districts were unconstitutional. We reached this conclusion despite the fact that we had previously held that 'when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multimember districts as a general matter.'

Id. at 42 (internal citations omitted). Thus, "[w]henever a district court is faced with entering an interim reapportionment order that will allow elections to go forward it is faced with the problem of 'reconciling the requirements of the Constitution with the goals of state political policy.'" *Upham*, 456 U.S. at 43 (quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977)). "An appropriate reconciliation of these two goals 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.*" *Id.* (emphasis added).

The three-judge court in *Doulin v. White*, 535 F. Supp. 450 (E.D. Ark. 1982) ("*Doulin II*") followed *White v. Weiser* in fashioning a remedy, after declaring the Arkansas congressional redistricting plan invalid under the principle of one-person, one-vote. The court was presented with eight plans during the remedial phase: two of which had previously been before the legislature and six proposed by the plaintiffs. The court reasoned that Act 985 of 1981 was a duly-enacted statute establishing the State's four congressional districts, and. therefore, the "decisions thus made by the legislature in pursuit of what were deemed important state interests ... should not be unnecessarily put aside, notwithstanding the fact that Act 965 itself has not withstood constitutional attack." *Id.* at 452 (internal quotation marks omitted). The court chose the plan closest to the unconstitutional plan, even though that plan did not have the lowest population deviation of all the plans then before it. *See id.* The court explained: "Here, everyone agrees that the original Miller Bill is significantly closer to Act 965 than any of the newly suggested plaintiffs' plans. In fact, Act 965 is the Miller Bill, as amended in the House." *Id.* "By adopting the original Miller Bill, we accomplish two important objectives at the same time: population variance is reduced from 2.10% in Act 965 to only 0.78%; and the desires of the people's elected representatives, as expressed by law, are adhered to except for the location of three counties." *Id.*

Similarly, the three-judge court in *State of Kansas v. Graves*, faced with implementing a plan after declaring the existing congressional redistricting plan invalid, chose a plan that "honored the lines drawn in [the invalided plan] S.B. 767." 796 F. Supp. 468, 473 (D. Kan. 1992). As the court explained, "[a]doption of this plan would come the closest possible to deferring to the legislative will and intruding upon state policy as little as possible, emphasized as our duty in White, while meeting the constitutional standard enunciated in the Supreme Court cases." *Id.*

The "path" of the redistricting plan at issue in *Abrams v. Johnson*, 521 U.S. 74 (1997) is also instructive. After the Supreme Court affirmed the decision of the three-judge court that invalidated Georgia's 11th congressional district because it was drawn predominately on racial grounds and providing the Georgia legislature with an opportunity to adopt a new congressional plan, the three-judge court had to craft a remedy. *See Johnson v. Miller*, 922 F. Supp. 1556, 1559 (S.D. Ga. 1995). The court explained its mission:

> In fashioning a remedy in redistricting cases, courts are generally limited to correcting only those unconstitutional aspects of a state's plan. ... The rationale for such a 'minimum change' remedy is the recognition that redistricting is an inherently political task for which federal courts are ill-suited. A minimum change plan acts as a surrogate for the intent of the state's legislative body.

Id. (internal citations omitted).

The three-judge court, however, did not use the plan passed by the state legislature as the baseline for imposing a remedy because "Georgia's current plan was not the product of Georgia's legislative will. Rather, the process producing Georgia's current plan was tainted by the unconstitutional [Department of Justice] interference." *Id.* at 1560. Because the Department of Justice had used the pre-clearance process to bully the state legislature in *Miller* into adopting a plan that maximized minority-majority voting districts and draw districts where race was the predominant motivation, the plan enacted did not represent the "legislature's true intent." *Id.* at 1560-61. Thus, the court concluded that "[b]ecause we are unable to use Georgia's current plan as the basis for a remedy, we [are] compelled to devise our own plan." *Id.* at 1561.

The Supreme Court affirmed, agreeing that the pre-cleared plan was not entitled to deference because "when the Georgia Legislature yielded to the Justice Department's threats, it also adopted the Justice Department's entirely race focused approach to redistricting - the max-black policy." 521 U.S. at 85-86. Had the

three-judge court used the pre-cleared plan passed by the legislature as the basis for a remedy, it "would [have] validate[d] the very maneuvers that were a major cause of the unconstitutional districting." *Id.* at 86.

2. Application

Unlike the case before the Supreme Court in *Abrams*, there is no unconstitutional taint to Act 1 that would require this Court to ignore using Act 1 as a basis for adopting a redistricting plan. While Plaintiffs have attempted to resurrect their partisan gerrymandering claim in these proceedings, the fact remains that they were unable to allege sufficient facts to support a partisan gerrymandering claim. *See* Memorandum in Support of February 22, 2002 Order (dismissing Plaintiffs' partisan gerrymander claim). The only claim of constitutional deficiency in Act 1 before this court is whether Act 1 complies the with one-person, one-vote principle.

If this Court, unlike the three-judge court in *Anne Arundel County*, allows Plaintiffs to litigate their defunct *Davis v. Bandemer* claim by subterfuge in the context of a one-person, one-vote challenge, then it will "virtually guarantee that a federal court, in a sort of judicial receivership, will ultimately conduct redistricting—a process the Supreme Court has consistently recognized as political." *Anne Arundel County*, 781 F.Supp. at 399.

The only plan presently before the Court which tracks Act 1 is "Act 1, Mod 1" (Dft. Ex. 90, 99), the plan that Defendants offered to show the effect on precinct splits if Act 1 were taken to "zero." It is the plan this Court must adopt should it conclude that a court-adopted congressional redistricting plan for Pennsylvania is required.

III. EVIDENCE

A. Partisan Bias

Even if the data on which Dr. Lichtman (Plaintiffs' statistical expert) relied had been reliable (which it was not, as explained below), his conclusions do not establish partisan bias.

Dr. Lichtman's seats votes comparison methodology is not a measure of "partisan bias" as political scientists calculate it. Tr. Vol. IV at 23-24 (Brunell). Dr. Lichtman testified that he compared the relative strength of Republicans and Democrats across the state and then compared the statewide partisan division between Republicans and Democrats to the partisan divisions in each of the congressional districts under the plan. According to Dr. Lichtman, if the partisan strength of the two parties for the whole state is divided 50/50, then under a fair plan, each party should have a majority in 50% of the districts, and to the extent the division of districts departs from 50/50, the plan is tilted in favor of one of the parties. Tr. Vol. I: 90 (Lichtman). He concluded that the two parties are evenly divided over the ten-year period based on 19 election results, with approximately 50 percent of the vote going to the Democrats and 50 percent going to the Republicans. Tr. at 94-95. He further concluded that because more districts have a Republican majority (12 of the old 21 districts) than a Democratic majority (nine of 21 districts), Act 1 has a 24 % bias in favor of the Republicans. Tr. Vol. I: 95-96 (Lichtman).

Dr. Brunell persuasively disagreed with the conclusions Dr. Lichtman derived from his application of this methodology. Tr. Vol. IV at 8 (Brunell). Partisan bias is not computed by a rough assessment of seats and votes; nor does it depend on how many more seats are held by one party versus the other party. While Dr. Lichtman testified correctly that partisan basis is the departure from partisan symmetry, Tr. Vol. I:96 (Lichtman), partisan symmetry, as Dr. Brunell

explained, is measured in a far more precise manner. Tr. Vol. IV: 23-24 (Brunell). There are a number of methodologies that take advantage of new computer technology and the abundance of relevant available information and one, a program called JudgeIt, is, in Dr. Brunell's opinion, the best tool for assessing partisan bias. Tr. Vol. IV, at 31-32 (Brunell). Dr. Brunell explained that the program was developed by two political scientists, Dr. Andrew Gelman and Dr. Gary King, in response to the need for a tool to help assess partisan bias in redistricting cases. Tr. Vol. IV at 23-24 (Brunell). Dr. Lichtman did not use JudgeIt to determine the existence of partisan bias under Act 1. Tr. Vol. IV: 23-24 (Brunell).

A partisan bias analysis looks at the entire electoral system to see if both parties are treated symmetrically. An electoral system is symmetrical if the party that wins a majority of the votes also wins a majority of seats. Tr. Vol. II:156 (Lichtman); Tr. Vol. IV:13-14 (Brunell). If partisan bias is systemic within the electoral system, it should manifest itself in every single election. The data compiled by Mr. Priest, on which Dr. Lichtman relied, does not bear out the high level of partisan bias alleged by Dr. Lichtman. Tr. Vol. IV:11-14 (Brunell).

To demonstrate, Dr. Brunell used the Presidential election in which Gore won over Bush by 52% to 48%, relatively close to a 50/50 race. If Dr. Lichtman's model were accurate, this would have translated to a three to one advantage in congressional districts for the Republicans. Instead, the majority votes for Gore translated into a majority of the hypothetical congressional districts for the Democratic party. Tr. Vol. IV:12 (Brunell).

To the extent that Dr. Lichtman's methodology provides some indication of the "political fairness" of an electoral system, his methodology, correctly applied, results in the conclusion that redistricting under Act 1 is not politically unfair. Notwithstanding Dr. Lichtman's assertion that looking at statewide elections results

one by one and drawing a seats votes curve would result in the same conclusion that Act 1 is tilted in favor of the Republicans, Tr. Vol. II:188 (Lichtman), the data he used would show that Act 1 redistricting complies with the majoritarian principle illustrated by a seats-votes curve. Tr. Vol. IV:14, 49 (Brunell).

The seats-vote curve provides a threshold measure of electoral system fairness known in the political science field as the "majoritarian principle." Tr. Vol. IV:13-18 (Brunell). Dr. Brunell illustrated the majoritarian principle with a chart that reflects the percentage of votes won by the Republican party on the x-axis and the percentage of Republican seats on the y-axis. *See* Dft. Ex. 101. Because the United States does not have a proportional system of representation, there is a curving linear relationship between the percentage of votes and the percentage of seats. Tr. Vol. IV:16 (Brunell). So if a party gets 50.01% of the votes in the state and their votes are spread efficiently across the districts, that party can pick up every seat. Tr. Vol. IV:16 (Brunell). A party receiving slightly more than a majority of the votes, if efficiently spread across the districts, will win a much higher percentage of the seats. Tr. Vol. IV: 16 (Brunell).

Dr. Brunell testified that in plotting the 19 reaggregated statewide elections that Dr. Lichtman used for his analysis on the seats-vote graph, all the elections fall into either the upper right-hand quadrant or lower left-hand quadrant, which illustrates the principle that whichever party received the majority of votes also received the majority of seats. Tr. Vol. IV:18, 49 (Brunell). Accordingly, application of the majoritarian principle does not demonstrate partisan bias in Act 1. Tr. Vol. IV: 17-18 (Brunell).[6]

---

[6] If a party received less than a majority of the votes yet could convert those votes to a majority of the seats (reflected by a dot in the upper left-hand quadrant and a corresponding dot in the lower right-hand quadrant), it would violate the majoritarian principle. Tr. Vol. IV:17-18 (Brunell).

Moreover, Dr. Lichtman's methodology was not a very good predictive tool, as demonstrated by its erroneous "post-diction" of the past decade of congressional elections. In Plt. Ex. 12, Table 1, Dr. Lichtman labeled a district "Dem" (Democrat) if the percentage of the reaggregated 19 statewide elections was over 50%; otherwise he labeled the district "Rep" (Republican). Tr. Vol. II:137-38 (Lichtman). Dr. Lichtman conceded that his methodology resulted in three incorrect predictions as applied to historical fact (i.e., when applied retrospectively to the existing 21 districts) –District 4 should have been a Democrat seat (it is held by Republican Congresswoman Hart) and Districts 6 & 13 should have been held by Republicans (they are held by Democrat Congressmen Holden and Hoeffel, respectively). Plt. Ex. 12, Table 1; Tr. at 99 (Lichtman). In other words, Dr. Lichtman's methodology was only 85.7% accurate. This lack of predictive accuracy is born out by Dr. Lichtman's correlations in Table 10, which, even if they were reliable, indicate that his averaged reaggregated statewide elections correlate to actual congressional elections between 82.7% and 87.2% of the time.[7]

Dr. Brunell also noted that Dr. Lichtman's methodology predicted that Republicans should win 12 of the 21 seats in Congress in the past 10 years, but that in fact in four of five election years Republicans won only 10 of 21 seats and didn't win 11 seats until the 2000 election. Tr. Vol. IV, 10-11 (Brunell). Dr. Brunell concluded that Dr. Lichtman's methodology incorrectly post-dicted every congressional election during the last 10 years in favor of the Republicans, i.e., indicating that the Republicans would get more seats than they actually did. Tr. Vol. IV:11 (Brunell).

---

[7] In eliminating uncontested races from his correlation analysis in Table 10, Dr. Lichtman dropped three times as many unopposed Republican races as Democrat aces, or a total of 1.7 million Republican Votes compared to 593,000 Democrat votes, a fact Dr. Lichtman found unsurprising but not germane. Tr. Vol. II:177 (Lichtman), Pl. Ex. 13.

Given the unreliability of the underlying data on which Dr. Lichtman based his calculations, it is highly unlikely that Dr. Lichtman's calculation of 50.3 or 49.8 party "voting weights" is accurate. Tr. Vol. IV:9 (Brunell). However the same becomes obvious by taking the common sense approach employed by Dr. Brunell when challenging Dr. Lichtman's primary assumption that Democrat and Republican voting strength is evenly divided in Pennsylvania as failing to comport with political reality. Tr. Vol. IV: 9 (Brunell). All the elected officers in the Executive Department branch of Pennsylvania government, with the sole exception of the Auditor General, are held by Republicans: the Governor, Lieutenant Governor, Attorney General and Treasurer are each Republican; Republicans are in the majority in both the Pennsylvania House and Senate; both United States Senators (Specter and Santorum) are Republican; 11 of the 21 current incumbent Members of Congress are Republican; all 7 appellate judicial races in 2001 were won by Republicans; and, of the 19 statewide races used by Dr. Lichtman, 12 resulted in Republican victories and seven in Democrat victories. *See* Tr. Vol. II: 139, 143 (Lichtman); Vol. III:231-232 (Ceisler); Dft. Ex. 89.[8]

---

[8] There are also serious flaws in Dr. Litchman's methodology that cast doubt on his conclusions. Dr. Brunell identified a number of deviations from standard practice in the field in Dr. Lichtman's methodology. Dr. Lichtman testified that he prepared Table 11 of Plt. Ex. 12 to demonstrate from another perspective the correlation statewide elections and congressional elections. Tr. Vol. I: 104-105 (Lichtman). Contrary to his repeated assertions throughout his testimony, *see* Tr. 105, 106, 192, Dr. Lichtman's chart does not reflect a perfect "one-to-one" correspondence between statewide and congressional elections. Table 11 reflects an imperfect correlation ranging for all elections years but 2000, ranging from two percent to 10 percent, and perhaps a higher percentage of error had Dr. Lichtman carried out his decimal points in a uniform manner across his chart. Tr. Vol. IV: 25 (Brunell). There are other flaws in Dr. Lichtman's method. In Plt. Ex. 12, Table 11, he did not report a standard error although it is standard practice in the political science field to do so. Tr. Vol. IV:24, 27 (Brunell). It is also standard operating procedures to report the constant in a regression analysis like that used in Plt. Ex. 12, Table 10, but Dr. Lichtman did not do so. Tr. Vol. IV:27 (Brunell); Tr. Vol. II:178 (Lichtman). Another standard practice in performing a regression analysis of the type used by Dr. Lichtman in creating Plt. Ex. 12, Table 10 is to weight the voting precincts to account for the large differences in size. Since Dr. Lichtman did not specify that he weighted the precincts, it must be assumed that he

B. Elections Database Underlying Dr. Lichtman's Testimony

1. Standard

Under Fed. R. Evid. 703, the facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. The reliability standard of Fed. R. Evid. 702 is used under Rule 703 to test the reliability of the data underlying an expert's opinion. *See In re Paoli R.R. Yard PCB Litigation,* 35 F.3d 717, 748 (3d Cir. 1994) (standard of reliability of the underlying data "is equivalent to Rule 702's reliability requirement – there must be good grounds to find the data reliable."). "If the underlying data are so lacking in probative force and reliability that no reasonable expert could base an opinion on them, an opinion which rests entirely upon them must be excluded." *Id.* at 748 (citation omitted). A judge must make an independent evaluation of the reliability of data; it is not enough that an expert aver that his testimony is based on a type of data on which experts reasonably rely. *Id.* at 747-49.

Courts have excluded expert testimony where the expert's analysis and conclusions derived from erroneous or incomplete data or facts lacking an adequate foundation of trustworthiness. In *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1114 (5th Cir. 1991), the Fifth Circuit emphasized that a court's inquiry into the types of facts and data underlying an expert's testimony is not limited to the admissibility of the data, i.e., whether the facts and data are of a type

---

did not. Tr. Vol. IV:28 (Brunell). Dr. Lichtman testified that he had performed certain sensitivity analyses, *see e.g.,* Tr. Vol. I:186 (Lichtman), but contrary to standard practice, did not report them. Tr. Vol. IV: 28-29 (Brunell).

reasonably relied upon by experts in the particular field. Rather, a court "may reject opinions founded on critical facts that are plainly untrustworthy, principally because such an opinion cannot be helpful to the jury." *Id.*

> The argument that Rule 703 addresses only generic facts and data and is unconcerned with the sufficiency and accuracy of underlying facts as they relate to the case at hand, will lead to the irrational result that Rule 703 requires the court to admit an expert's opinion even if those facts and data upon which the opinion are based are crucially different from the undisputed record. Such an interpretation often will render Rule 703 impotent as a tool for testing the trustworthiness of the facts and data underlying the expert's opinion in a given trial. Certainly nothing in Rule 703 requires a court to admit an opinion based on facts that are indisputably wrong. Even if Rule 703 will not require the exclusion of such an unfounded opinion, general principles of relevance will. In other words, an opinion based totally on incorrect facts will not speak to the case at hand and hence will be irrelevant. In any event such an opinion will not advance the express goal of 'assisting the trier of fact' under Rule 702.

Id. at 1114-15. *See also United States v. City of Miami*, 115 F.3d 870, 873 (11th Cir. 1997) (expert testimony admissible only if expert knows of facts that enable expert to express reasonably accurate conclusion; opinions derived from erroneous data are appropriately excluded); *Orson, Inc. v. Miramax Film Corp.*, 983 F. Supp. 624, 635 (E.D. Pa. 1997) (expert testimony cannot be so fundamentally unsupported by facts that it offers no assistance to factfinder); *O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376, 1392 (C.D. Ill. 1992) (critical evaluation of bases of expert's opinion furthers court's interest in providing relevant, accurate information to jury to help decide fact in issue; if basis of expert opinion is unsound, expert's conclusion is inaccurate and should not be allowed).

2. Application

Plaintiffs established no foundation for the data that served as the basis for Dr. Lichtman's compilations, calculations, analyses and conclusions.[9] Plaintiffs did not present certification of their database as a public document by an official

[9] Presiding Officers objected to admission of Plaintiffs' reaggregated elections results. Tr. 82-83.

with the legal duty to correctly maintain the data.[10] To the contrary, the reaggregated election result data used by Dr. Lichtman differs significantly from data maintained by the official public custodians. Tr. Vol. I: 48-50; *compare* Dft. Ex. 60-65 (General Elections Results for 2000, 1998, 1996, 1994, 1992, and 1991, respectively) and Plt. Ex. 13 at 11-14; *see also* Dft. Ex. 89. Mr. Priest, who compiled the data, conceded that there are variances between the reaggregated general elections results he provided and the reaggregated elections results certified by the Department of State. Tr. Vol. I:49 (Priest). Mr. Priest's total numbers for 14 of 19 elections resulted in a Democrat number that either gained more or lost less than the Republican number, i.e., Mr. Priest's variance from the official favored the Democratic candidate in 14 of the 19 election races he used. *Id.*

Mr. Priest testified that he received the official elections database from LDPC but that he then reallocated election results from old precincts to new precincts, using his own judgment, to account for precinct lines that changed over the past decade. Tr. Vol. I: 50-52 (Priest). This process involved Mr. Priest's subjective reallocation of vote totals from old precincts into the new precincts "by hand," i.e., using individual keystroke entries, which resulted in a "history" of election results that differed from the database maintained by the LDPC. Tr. Vol. I:51 (Priest). Mr. Priest conceded that the differences between his reaggregated elections results and the official elections results were present in each of the election reaggregations he provided for each of Plaintiffs' alternative redistricting plans. Tr. Vol. I: 74 (Priest). Mr. Priest acknowledged that precinct boundaries

---

[10] Public records, including data maintained in computers in public offices, may be authenticated by proof of custody. *See* Fed.R.Evid. 901 –Advisory Committee Notes – 1972 Proposed Rules. Certified copies of public records are deemed self-authenticating and admissible without more under Federal Rule of Evidence 902.

change with some frequency and that depending on the area of the state, the farther back in time you go, the less the present precinct boundaries will resemble historical precinct boundaries, as Population growth will increase the number of precincts while population loss will reduce the number of precincts. Tr. Vol. I:51-52 (Priest).

Mr. Priest's subjective alteration of the official elections results database, even apart from the fact that the alterations apparently benefited Plaintiffs' litigation position, makes the data untrustworthy. The data are facially inaccurate and unauthenticated and were not produced for examination by Defendants Officers, as required by Fed. R. Evid. 1006[11] before Mr. Priest's compilation could be admitted into evidence. *See SEC v. Hughes Capital Corp*, 124 F.3d 449, 455-56 (3d Cir. 1997) (affirming district court's exclusion of photocopies of check stubs as lacking trustworthiness because they had been altered before photocopying and the originals were not produced).

An expert's opinion must be based on accurate information to assist the finder of fact decide the facts in issue. Data that lack a foundation and for which there has been no demonstration of trustworthiness must be excluded as inadmissible hearsay lacking relevance. Under Fed. R. Evid, 402, evidence that is not relevant is not admissible. Dr. Lichtman relied on the election information Mr. Priest provided in Plt. Ex. 13 to perform his analyses that are summarized in Plt. Ex. 12, Tables 1-5, 6 and 9, 10-12. Tr. Vol. I: 92; Vol. II:178, 179 (Lichtman). Accordingly, Dr. Lichtman's expert testimony based on Mr. Priest's subjectively altered, unauthenticated, and untrustworthy data, must be stricken.

---

[11] Fed. R. Evid. 1006 provides:

> The contents of voluminous writings which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties ... . The court may order that they be produced in court.

Moreover, Dr. Lichtman's reliance on the data provided by Mr. Priest was not reasonable in light of the circumstances. Information may be considered reliable in one context but unreliable in others. For example, a doctor may rely upon the medical history provided by a patient to diagnose and treat that patient. However, if a doctor evaluates a patient in preparation to testify as an expert in litigation, the doctor must rely on something more than that patient's self-report of symptoms or illness and must examine the patient or review the patient's medical records. "Common sense alone suggests that such evidence is 'based on an unreliable source of information.'" *In re TMI Litigation*, 193 F.3d 613, 698 (3d Cir. 1999) (quoting *Paoli*, 35 F.3d at 762). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) ("One very significant factor to be considered is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying."); *Christophersen*, 939 F.2d at 1111 (while reports of others can provide a reliable basis for an expert's opinion when reliance on such sources is the custom of the discipline, "a common-sense skepticism may be warranted when an expert's factual basis is derived, not from treatment or observation, but from subjective information obtained from counsel or client in preparation for trial").

If a candidate sought an assessment of the politics of a particular electoral district and provided summaries of political data to an expert, the expert might be able to provide an assessment that was good enough for that purpose. However, in litigation challenging the constitutionality of a statute establishing a state redistricting plan, an expert's reliance on such data, given facial errors in the summaries and lacking independent indicia of the reliability of the underlying data, renders conclusions based on that data inadmissible.

C. Compactness Scores and Retention Data

1. Standard

Before a document may be admitted into evidence, a proper foundation must be established to show that the document is what it purports to be. Four elements establish the foundation of documentary evidence: (1) authenticity; (2) genuineness; (3) identity; and (4) trustworthiness of underlying data. The first three elements are governed by Fed. R. Evid. 901(a), which provides:

> The requirement of authentication or identification as a condition precedent to the admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

In order for the proffered evidence to be admissible, the proponent must offer "a foundation from which the fact-finder could legitimately infer that the evidence is what its proponent claims it to be." *In re Japanese Electronics Products Antitrust Lit.,* 723 F.2d 238, 285 (3d Cir. 1983), *rev'd on other grounds,* 475 U.S. 574 (1986). The Third Circuit described what constitutes a proper foundation under Fed. R. Evid. 901:

> The evidence which suffices to establish authenticity should be evidence that is relevant to the limited question of genuineness: that is, evidence admissible against the party *having such a relationship to the proffered materials that it is likely to know the facts as to genuineness.*

Id. (emphasis added). Rule 901(b) provides examples of methods by which the "genuineness" of a document can be shown, including: (1) testimony of a witness with knowledge; (2) recognizing document as a public record; and (3) evidence describing the process or system used to produce the result.

A witness with personal knowledge of a matter may establish the foundation through the witness's own evidentiary testimony. *See* Fed.R.Evid. 602 –Advisory Committee Notes – 1972 Proposed Rules. In the absence of personal knowledge, no foundation for the testimony exists, and the testimony must be excluded as

irrelevant. Fed.R.Evid. 602; *see Owen v. Patton,* 925 F.2d 1111, 1113 (8th Cir. 1990) (testimony of witnesses that when they asked for person in charge were directed to certain individual found inadmissible where no evidence proffered that witnesses directed their inquiry to persons likely to possess the requisite knowledge of who was in charge); *F. Buddie Contracting, Ltd. v. Cuyahoga Community College,* 31 F.Supp.2d 571 (N.D. Ohio 1998) (private studies not authenticated by witness with personal knowledge considered inadmissible hearsay).

What is necessary to establish the trustworthiness of information varies with the facts of each case. With respect to computer data (which is susceptible to error, alteration, and manipulation that are difficult to detect and correct), the court's examination of its trustworthiness should be searching. *See e.g.,* MANUAL FOR COMPLEX LITIGATION THIRD, Federal Judicial Center (1995) at 80 ("Computerized data may [] raise unique issues concerning the accuracy and authenticity of the database. Accuracy may be impaired as a result of incorrect or incomplete entry of data, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunctions.") The proponent of computerized evidence must lay a proper foundation by establishing its accuracy. *Id.* at 80-81. *See also United States v. Liebert*, 519 F.2d 542, 547 (3d Cir. 1975) (computer printout is admissible in a criminal trial provided that the party offering the computer information lays a foundation sufficient to warrant a finding that such information is trustworthy and the opposing party is given the same opportunity to inquire into the accuracy of the computer and its input procedures.).

With respect to data compilations, Fed. R. Evid. 1006 requires the proponent to show that: (1) the evidence is so voluminous that it "cannot be conveniently examined in court" by the trier of fact; (2) the proponent made the evidence

"available for examination or copying, or both, by other parties" at a reasonable time or place; (3) the underlying documents are admissible in evidence; (4) the document is accurate and not prejudicial; and (5) a proper foundation is laid for the summary document. *United States v. Bray,* 139 F.3d 1104, 1109-1110 (6th Cir. 1998). A compilation must summarize the underlying information accurately, correctly, and in a nonmisleading manner. *Id.* Rule 1006 requires the proponent of the summary to establish that the underlying documents are admissible in evidence. A summary based on inadmissible documents (e.g., those based on hearsay not admissible under any exception or those inadmissible for irrelevancy, unfair prejudice or lack of authenticity) is likewise inadmissible. *Id.* at 1109-1110.

Before admitting any charts, summaries, or data compilations, a court must ensure that the document is grounded upon a "'sufficient factual basis,' i.e. upon independently established evidence in the record." *United States v. Sawyer,* 85 F.3d 713, 740 (1st Cir. 1996). In *Sawyer*, the court described its responsibility under Fed. R. Evid. 1006:

> When a court admits such summaries, care must be taken to insure that summaries accurately reflect the contents of the underlying documents and do not function as pedagogical devices that unfairly emphasize part of the proponent's proof or create the impression that disputed facts have been conclusively established or that inferences have been directly proved.

Id. (citation omitted). As stated by the Second Circuit, "a proper foundation connect[s] the numbers on the chart with the underlying evidence." *United States v. Koskerides,* 877 F.2d 1129, 1134 (2d Cir. 1989). A foundation may be established by testimony authenticating the system that produced the resulting proffered evidence. Analogous to chain-of-custody proof, a proper foundation must necessarily trace a proffered document and/or its underlying data to the original data source. *See e.g., AEL Indus., Inc. v. Loral Fairchild Corp.,* 882 F. Supp. 1477 (E.D. Pa. 1995) (holding summaries of accounting records based on

employee time cards inadmissible because the employees preparing the exhibits and accounting records had no personal knowledge of the underlying expenses and plaintiff failed to make the time cards underlying the accounting summaries available to defendant); *United States v. Alicea-Cardoza,* 132 F.3d 1, 4 (1st Cir. 1997) (foundation of charts of intercepted beeper messages purportedly sent by the defendant to a partner adequate where testimonial evidence verified the data from which the charts were made and a witness explained how a pen register device intercepted and recorded the beeper messages and how a clone beeper confirmed the accuracy of the pen register.); *United States v. Pelullo*, 961 F. Supp. 736 (D.N.J. 1997) (summary charts had been properly authenticated where the creator of the charts testified how the documents forming the basis of the charts were obtained and how the charts were prepared, and custodians of the records forming the basis for the charts identified the underlying documents and testified how the records were made and maintained.).

2. Application

Plaintiffs established no evidentiary foundation for admission of any data regarding the compactness of Act 1 or any other proposed plans (Plt. Ex. 13 at 1-3, 16-18, 23-25, 34-36, 45-47, 55-57).[12] Mr. Priest was unaware of the algorithm used by the software program to measure compactness, various scientific measures of compactness, the significance of the results, the level of geographic detail used to produce the compactness measures, and variances that may be produced by different formulae. Tr. Vol. I: 37-39 (Priest). Mr. Priest testified that the compactness analysis was done by the computer software package; he merely "ran the numbers when he was requested to do so." Tr. Vol. I: 39-40 (Priest). There is no foundation for Mr. Priest's compilations of compactness measurements.

[12] Defendants objected to admission of compactness score compilations. Tr. Vol. I: 81-82 (Krill).

Likewise, Plaintiffs laid no foundation for the admission of retention data reflected in Plaintiffs' Exhibit 12, Tables 8 & 12.

Plaintiffs introduced no evidence to demonstrate the trustworthiness of the evidence of compactness or of the percentage of constituents retained by the incumbents of each party. The lack of foundation and authentication of the compactness scores and retention data also precludes the admission of Mr. Priest's compactness data compilations under Fed. R. Evid. 1006.

Dr. Lichtman's use of the unreliable data does not transform it into admissible data. Dr. Lichtman did not perform any calculations to establish the relative compactness of Act 1 or any proposed plan and did not calculate or retest for accuracy of the constituent retention data. Rather, Mr. Priest provided information regarding compactness to Dr. Lichtman, who merely entered it into two charts (Plt. Ex. 12, Tables 6 & 7). Tr. Vol. I:160, 164 (Lichtman). Dr. Lichtman did not comment on the statistical relevance of these calculations individually or as applied to individual districts but instead assigned ranks to the compactness measures and four other unrelated factors in Table 7 and then created a mean rank for each plan. *See* Plt. Ex. 12, Table 7. However, the numbers attached to each of the factors have different meaning in their own right, so there is no point to ranking them. Tr. Vol. IV:20-21 (Brunell). Dr. Lichtman was unable to cite any professional literature that uses such a table to rank the different factors he ranked. Tr. Vol. II:171 (Lichtman). Dr. Brunell testified that he had never seen a table like Table 7 in which ranks were assigned to such factors and then the ranks were averaged. Tr. Vol. IV: 20 (Brunell).

Similarly, Mr. Priest provided the conclusions reflected in Plaintiffs' Exhibit 12, Table 8. Tr. Vol. II: 172 (Lichtman). Dr. Lichtman did not calculate the constituent retention percentages or independently test them for accuracy. In his

testimony, he merely presented the conclusions already provided to him. Tr. Vol. II:119-120 (Lichtman).

Fed. R. Evid. 703 does not open the door for the admission of inadmissible evidence under the guise of expert testimony. Untested conclusory data provided to an expert for which no foundation was established and which the expert witness did not analyze is unreliable hearsay and cannot "morph" into admissible evidence through an expert's presentation of it. *See, e.g., In re TMI Litigation*, 193 F.3d at 705 (excluding expert's opinion which relied on unreliable summaries of personal family and medical history and conclusions of other experts whose opinions had been excluded as unreliable).

Because Plaintiffs failed to establish a foundation for the conclusory data presented by Dr. Lichtman as expert testimony regarding the compactness of Act 1 and other plans or the percentage of constituents retained, on average, by the incumbents of each of the political parties, his testimony regarding compactness and constituent retention is inadmissible.

CONCLUSION

For the reasons set forth above, Presiding Officers request that this Court dismiss Plaintiffs' only remaining claim, i.e. that Act 1 is unconstitutional because it violates the one person, one vote principle, and enter judgment in favor of Defendants.

Respectfully submitted,

March 15, 2002

Linda J. Shorey
Pa. ID No. 47477
Julia M. Glencer
Pa. ID No. 80530
Jason E. Oyler
Pa. ID No. 84473
John P. Krill, Jr.
Pa. ID No. 16287
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
Counsel for Jubelirer and Ryan

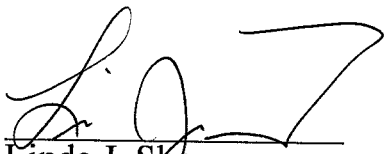
CERTIFICATE OF SERVICE

I certify that on March 15, 2002, I caused a copy of Presiding Officers Post-Hearing Brief on the following in the manner indicated:

Fax and First class mail
Paul M. Smith
Thomas J. Perrelli
Daniel Mach
Brian P. Hauck
JENNER & BLOCK, L.L.C
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000
Counsel for Plaintiffs

Hand Delivery
Robert B. Hoffman
REED SMITH LLP
213 Market Street, 9th Floor
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042
Counsel for Plaintiffs

Hand Delivery
J. Bart DeLone
Senior Deputy Attorney General
Office of Attorney General
Appellate Litigation Section
15th Floor Strawberry Square
Harrisburg, PA 17120
(717) 783-3226
Counsel for the Commonwealth, Governor Schweiker, Secretary Pizzingrilli, & Commissioner Filling



Linda J. Shorey
Pa. ID No. 47477
KIRKPATRICK & LOCKHART LLP
240 North Third Street
Harrisburg, PA 17101
(717) 231-4500
(717) 231-4501 (fax)
Counsel for Defendants Jubelirer and Ryan