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

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

**PRESIDING OFFICERS' MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' MOTION TO EXPEDITE**

INTRODUCTION

Plaintiffs seek, in essence, to have this Court reconsider its reconsideration of its decision setting a hearing in this case. They seek to further compress the already truncated litigation process, to the further prejudice of the defense of a duly-enacted statute. Their basis is in allegations that they have not attempted to prove and that they cannot prove. Their requested relief would itself be contrary to law and the public interest, prejudicial to the administration of the election process and, ultimately, of no avail to them, because of the inability of the Court to act in lieu of the state legislature. Presiding Officers oppose any alteration to the current scheduling order.

ARGUMENT

On January 30, 2002, this Court issued an order vacating its prior order, scheduling discovery, motions *in limine*, requests for *Daubert* hearings and, ultimately, an evidentiary hearing on March 11-12, 2002. The schedule was an effort by the Court to accommodate the Plaintiffs' professed interest in expedition and the Defendants' interests in developing a defense without the prejudice inherent in overly aggressive proceedings. Contrary to Plaintiffs' suggestion, the scheduling order, issued in conjunction with the grant of Presiding Officers' motion for reconsideration of the order setting an evidentiary hearing for February 11, 2002, does not purport to hinge solely on the timing of the state court proceedings in *Erfer v. Commonwealth*. Plaintiffs' Memorandum at 3. Rather, the order represented an acknowledgement of Defendants' interests in time for the adequate preparation and presentation of a defense. The resolution of the part of the state court case concerning state constitutional claims does not support sudden acceleration of the schedule in this matter.

In seeking to advance the hearing date, Plaintiffs ignore the current status of this case. Presently pending before the Court are Presiding Officers' Motion to Dismiss and Motion to Abstain. These motions raise preliminary issues, which the Court acknowledged (during a conference call with counsel) would require a ruling before a hearing is held. Additionally, this Court has set February 22, 2002, as the due date for any motions *in limine* and/or requests for *Daubert* hearings. Presiding Officers intend to file one or more such motions tomorrow. The disposition of the various motions will affect the preparation of the defense for the March 11 hearing.

Moreover, Defendants simply need time to consider the data and the expert opinion proffered by Plaintiffs. The instant motion was filed only two business days after the deposition by the defense of Plaintiffs' last expert. This witness, Dr. Alan Lichtman, is not the same witness who testified in Commonwealth Court for Plaintiffs' counsel. Moreover, Dr. Lichtman produced at his deposition on Friday, February 15, new statistics not produced earlier, either in Commonwealth Court or by February 6, as required by this Court. Although defense counsel examined Dr. Lichtman on his new statistics during the deposition, the defense is still reviewing them. Dr. Lichtman did not produce the calculations that underlie his statistics, so the defense must attempt to check their accuracy, in addition to considering their implications for this case.

Plaintiffs point to the "findings" of the Commonwealth Court of Pennsylvania as support for their motion to expedite. Commonwealth Court made recommendations only. The Pennsylvania Supreme Court's order denying the state constitutional claims in *Erfer* makes no mention of the recommendations it received from Commonwealth Court. However, the ultimate conclusion of law recommended by Commonwealth Court was that the *Erfer* Petitioners (represented by the same counsel as Plaintiffs) had failed to prove any violations of the Pennsylvania Constitution, under standards largely if not completely tracking the federal standards applicable here. If anything, Commonwealth Court's recommended conclusion and the Pennsylvania Supreme Court's denial of the state constitutional claims made in the *Erfer* case undercut Plaintiffs' emphatic suggestions that harm to the voters is imminent and real.

On the contrary, there would be real harm to the public interest in granting the motion. Nominating petitions have, indeed, started to circulate as of February 19 and must be filed by March 12, as required by Pennsylvania law. The Court cannot enjoin this process, but it can throw it into disarray by scheduling an accelerated hearing that would occur in the middle of the process, leaving citizens and candidates to wonder where they should be gathering signatures for their petitions. Moreover, even in the unlikely event that the Court, after hearing, invalidates Act 1 of 2002, the Court would have to defer to the General Assembly of the Commonwealth to enact a new plan. Defendants have previously cited the case law on this point to the Court. What, then, would happen in the meantime? The Court might well conclude that it did not wish to enjoin the process under the current law, even if it considered it to be flawed. Again, three-judge courts have reached such conclusions, in precedent cited earlier to the Court. If, though, the Court enjoined the process under Act 1, all nominating activity would come to a halt. Even if the Court, contrary to precedent, refused to give the legislature the opportunity to enact new law, and undertook the task of redistricting itself, the process would not be completed on any timetable favored by Plaintiffs. The Court would have to entertain competing plans, not just from the parties, but from the public, and would undoubtedly receive petitions from persons seeking to intervene in order to participate in the map-drawing process. For the Court to put itself into the legislature's shoes would be quite a different matter than the threshold decision on the validity of the current enactment.

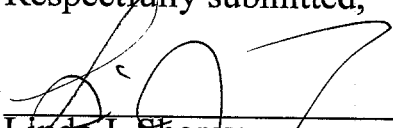
Even this brief contemplation of the future process shows how ill-considered the instant motion is, except from the point of view of the selfish interests advanced by Plaintiffs' counsel.

CONCLUSION

For the reasons set forth above, Plaintiffs' latest motion to expedite should be denied and the March 11-12, 2002 hearing date remain as scheduled.¹

February 21, 2002

Respectfully submitted,



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¹ While Plaintiffs are correct that Presiding Officers oppose the present motion, the circumstances by which concurrence was sought were unusual. Concurrence was apparently sought only by e-mail to John P. Krill, Jr. (Presiding Officers' counsel) and J. Bart DeLone (Executive Officers' counsel) by Mr. Hoffman (Plaintiffs' local counsel in this matter). At the time of the e-mail or shortly thereafter, Mr. Krill and Mr. DeLone were physically present at the office of Mr. Hoffman for the deposition of a defense witness. Neither Mr. Hoffman nor Plaintiffs' counsel who was conducting the deposition brought this motion to their attention and no other counsel of record for Defendants were copied on the e-mail regarding concurrence.

CERTIFICATE OF SERVICE

I certify that on February 21, 2002, I caused a copy of the foregoing Response of Presiding Officers to Plaintiffs' Motion to Expedite to be served on the following in the manner indicated:

Fax and First class mail

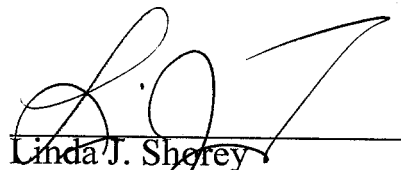
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