

2 TO 4

126
3-18-
SC

ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
FILED HARRISBURG
MAR 15 2002

RICHARD VIETH, et al,
Plaintiffs,
v.
THE COMMONWEALTH OF PENNSYLVANIA, et al.
Defendants.

MARY E. D'ANDREA, CLERK
Per [Signature]
DEPUTY CLERK

No. 1:CV-01-2439
(Judges Nygaard, Rambo & Yohn)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR DEFENDANTS LIEUTENANT GOVERNOR JUBELIRER AND SPEAKER RYAN

I. FINDINGS OF FACT ON SUBSTANTIVE ISSUES

Parties

1. Under Pennsylvania law establishing congressional districts, Plaintiffs Richard Vieth and Norma Jean Vieth live in the 16th congressional district. *See* Amended Complaint and Defendants' Answers at ¶2,3.
2. Under Pennsylvania law establishing congressional districts, Plaintiff Susan Furey lives in the 6th congressional district. *See* Amended Complaint and Defendants' Answers at ¶4.
3. Defendants are Mark Schweiker, Governor of Pennsylvania; C. Michael Weaver, Acting Secretary of the Commonwealth, Richard Filling, Commissioner of the Bureau of Commissions, Elections, and Legislation of the

Pennsylvania Department of State ("Executive Officers") and Robert C. Jubelirer, Lieutenant Governor and President of the Senate of Pennsylvania, and Matthew J. Ryan, Speaker of the House of Representatives of Pennsylvania ("Presiding Officers"). See Amended Complaint and Defendants' Answers at ¶5 and February 22, 2002 order of this Court at ¶(1)(A) (dismissing all claims against the Commonwealth).

Background

4. From 1992 until January of 2002, Pennsylvania's congressional districts were as established by the order of the Pennsylvania Supreme Court in *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992), after the General Assembly of the Commonwealth was unable to enact a redistricting statute.

5. Under the 1990 Census, Pennsylvania's total population was 11,881,643, making the "ideal" population for each of Pennsylvania's 21 congressional seats 565,792 or 565,793. See *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) at Appendix A. Under the 1992 court-ordered plan, Pennsylvania had 21 congressional districts, with an overall population deviation of 57 people. *Id.*

6. Pennsylvania has 67 counties, 2,569 cities, townships and boroughs and 9,427 election precincts. See THE PENNSYLVANIA MANUAL (115th ed.) (Dft. Ex. 81);¹ Tr. Vol. 3:297 (Memmi).²

7. Under the 1992 court-ordered congressional redistricting plan, 16 counties, 12 municipalities (cities, townships and boroughs), and 3 precincts were split. See *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) at Appendix A.

¹ Defendants' Exhibits are identified herein as "Dft. Ex." and Plaintiffs' Exhibits as "Plt. Ex."

² Pages in the transcript of proceedings held March 11-12 before this Court are identified herein as "Tr. Vol. _ : page number."

8. Under the 1992 court-ordered congressional redistricting plan, Montgomery County was split among five congressional districts, with the majority in the 13th District. *See Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) at Appendix A.

9. When congressional seats were reapportioned after the 2000 Census, Pennsylvania lost two seats, dropping from 21 to 19. *See STATISTICAL ABSTRACT OF THE UNITED STATES: 2001* at 238, Table No. 384 (Dft. Ex. 79).

10. Under the 2000 Census, Pennsylvania's total population was 12,281,054, making the "ideal" population for each of Pennsylvania's 19 congressional districts 646,371 or 646,372. *See THE PENNSYLVANIA MANUAL* (115th edition.), Section 6 at 12 (Dft. Ex. 81, also on Pennsylvania's website at www.dgs.state.pa.us/PAManual/home.htm).

11. Over the last decade, the population of Pennsylvania's largest county, Philadelphia, decreased 4.3%, from 1,585,577 in 1990 to 1,517,550 in 2000. *See THE PENNSYLVANIA MANUAL* (115th ed.), Section 6 at 12 (Table: Population of Counties: 2000-1990) (Dft. Ex. 81).

12. Over the last decade, the population of Pennsylvania's second largest county, Allegheny, decreased 4.1%, from 1,336,449 in 1990 to 1,281,666 in 2000. *See THE PENNSYLVANIA MANUAL* (115th ed. 2001), Section 6 at 12 (Dft. Ex. 81).

13. Between 1990 and 2000, high population growth occurred in southeastern counties outside Philadelphia (Chester, Montgomery, Bucks and Berks), in the Poconos Region (Monroe, Pike & Wayne) and in south-central Pennsylvania, as the following chart shows:

County	1990 Population	2000 Population	% Growth
Bucks	541,174	597,635	10.4%
Chester	376,396	433,501	15.2%
Monroe	95,709	138,687	44.9%

Montgomery	678,111	750,097	10.6%
Pike	27,966	46,302	65.6%
Wayne	39,944	47,722	19.5%
Lancaster	422,822	470,658	11.3%
York	339,574	381,751	12.4%
Berks	336,523	373,638	11.0%

THE PENNSYLVANIA MANUAL (115th ed.), Section 6 at 12 (Dft. Ex. 81).

14. In November 2000, there were 7,781,997 registered voters in Pennsylvania: 3,250,764 (41.8%) Republicans; 3,736,304 (48.0%) Democrats; 7,918 (00.1%) Constitution; 30,248 (00.4%) Libertarian; 756,763 (09.7%) Other. See THE PENNSYLVANIA MANUAL (115th ed.), Section 7 at 122-23 (Dft. Ex. 81) and Certification No. 2002-12b, Office of the Secretary of the Commonwealth (Dft. Ex. 76).

15. Voters who are registered Democrat are concentrated in Allegheny and Philadelphia Counties, with Allegheny County having 568,000 (15.2%) of the registered Democrat voters and Philadelphia County having 760,315 (20.3%) of the registered Democrat voters. See THE PENNSYLVANIA MANUAL (115th ed.), Section 7 at 122-23 (Dft. Ex. 81) and Certification No. 2002-12b, Office of the Secretary of the Commonwealth (Dft. Ex. 76)

16. Pennsylvania's current congressional delegation (elected in 2000 under the 1992 court-ordered redistricting plan), has 11 Republicans ("R")³ and 10 Democrats ("D"): District 1 – Brady (D); District 2 – Fattah (D); District 3 – Borski (D); District 4 – Hart (R); District 5 – Peterson (R); District 6 – Holden (D); District 7 – Weldon (R); District 8 – Greenwood (R); District 9 – Shuster (R); District 10 – Sherwood (R); District 11 – Kanjorski (D); District 12 – Murtha (D);

³ Political party affiliation is shown herein by placing the first letter of the party name in parenthesis following the individual's name. "R" indicates Republican and "D" indicates Democrat. Party affiliation is identified in a number of exhibits. See e.g., THE PENNSYLVANIA MANUAL (115th ed.) (Dft. Ex. 81).

District 13 – Hoeffel (D); District 14 – Coyne (D); District 15 – Toomey (R); District 16 – Pitts (R); District 17 – Gekas (R); District 18 – Doyle (D); District 19 – Platts (R); District 20 – Mascara (D); District 21 – English (R). *See* THE PENNSYLVANIA MANUAL (115th ed.), Section 8 at 12-17. (Dft. Ex. 81).

17. Congressman John Murtha (D) is the "dean" of the Pennsylvania congressional delegation, having been a member of Congress since 1974. He serves on the U.S. House Appropriations Committee. *See* THE PENNSYLVANIA MANUAL (115th ed.), Section 8 at 15 (Dft. Ex. 81)

18. Congressman Coyne (D), who has served in Congress since 1981, announced in August 2001 that he was retiring at the end of the term and would not seek reelection in 2002. *See* THE PENNSYLVANIA MANUAL (115th ed.), Section 8 at 12 (Dft. Ex. 81) (regarding term of service) and Tr. Vol. II:208 (Ceisler).

Enactment of Act No. 2002-1

19. The loss of 2 congressional seats and the population growth in Pennsylvania, made it necessary in 2002 to increase the size of congressional districts by approximately 100,000 individuals. Moreover, because of population shifts (i.e., decreased population in the urban centers, yet growth in the suburban Philadelphia area, in the counties of the Poconos region and in south-central Pennsylvania) some congressional districts were over-populated while some were well under the "ideal" population. The combination of the foregoing meant that large changes in the court-ordered 1992 congressional districts would be required for Pennsylvania to comply with the one-person, one vote principle. (Inference from preceding findings.)

20. The legislative history of redistricting shows that Pennsylvania's General Assembly made a good-faith effort to minimize population deviations between congressional districts. (Inference from following findings.)

21. The plan initially passed by the Senate, the plan initially passed by the House, and plan of the Conference Committee that was finally adopted by both chambers each had a population deviation that was multiples lower than the court-ordered 1992 plan. In contrast, the two plans that were offered but that never passed in either chamber (the O'Pake (D) and DeWeese (D) amendments) had population deviations that were multiples higher than that of the 1992 plan. *See* Dft. Ex. 18.

22. Members of the General Assembly were concerned with maintaining 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).

23. During the General Assembly's debate of various congressional redistricting plans, members of both parties urged that the senior member of Pennsylvania's delegation, Congressman Murtha (D) needed to be protected, i.e., needed a "safe" seat. *See e.g.* LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1194, 1195, 1197 (Mellow), 1199, 1204 (Sen. Brightbill), 1199 (O'Pake), 1202-03 (Wagner), 1206 (Kasunic) (Dft. Ex. 2); *See* LEGISLATIVE JOURNAL –HOUSE (Dec. 12, 2001) at 5, 14 (DeWeese), 10 (Rooney) (Dft. Ex. 3).

24. The General Assembly of the Commonwealth ultimately accommodated the requests of Congressman Murtha and the concern expressed for him in the debates, by creating a safe seat for him. *See* LEGISLATIVE JOURNAL - HOUSE (Jan. 3, 2002) at 15 (Perzel) ("[W]e were able to keep Congressman Murtha and Mascara in southwestern Pennsylvania. As a matter of fact, ... Murtha said,

the compromise map being worked out will not be to my disadvantage" (Dft. Ex. 4); Tr. Vol. III: 257 (Mascara).

25. Members of the General Assembly attach great significance to the party-by-party voter registration percentages of a district. *See* Tr. Vol. IV: 92-93 (Hallowell); *see also* LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 12 (Perzel) (Dft. Ex. 3) and LEGISLATIVE JOURNAL – HOUSE (Jan. 3, 2002) at 12 (Perzel) (Dft. Ex. 4) (announcing the voter registration majorities and pluralities under House passed version of SB 1200 and Conference Committee Report); LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) (O'Pake) (Dft. Ex. 2) (announcing voter registration percentages for District 8 under the O'Pake amendment).

26. Senate Bill 1200 was introduced by Senators Brightbill (R) and Lemmond (R) on November 16, 2001. *See* Bill History of SB 1200 (Dft. Ex. 1, also available, along with all bills & bill versions, through the General Assembly's Electronic Bill Room at www.legis.state.pa.us/WU01/LI/BI/billroom.htm).

27. A competing plan, SB 1241, was introduced by Senators Williams (D), Mellow (D), O'Pake (D), Wagner (D), Musto (D), Kasunic (D), Fumo (D) and Stout (D) on December 6, 2001. Dft. Ex. 13, 14.

28. 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) at 15 (Dft. Ex. 2).

29. The Senate agreed to Senator Brightbill's amendment by a 27-22 vote. LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1206 (Dft. Ex. 2).

30. Senator O'Pake offered an amendment that was the same congressional redistricting plan as that appearing in SB 1241. *Compare* legal description of SB 1241 (Dft. Ex. 13) with legal description for A4552 in LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1207-09 (Dft. Ex. 2).

31. Senator O'Pake's amendment had a total population deviation (i.e., difference between the largest and smallest populated district) of 146. Dft. Ex. 15. *See* LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1210 (Sen. O'Pake, standing for interrogation, explains that the plan's "maximum deviation is 146. That is total, of course. I am told the range would be from 87 below to 59 above.") (Dft. Ex. 2).

32. Senator O'Pake's amendment would have "maintained two minority-majority seats within the Philadelphia area" and made the following pairings of incumbent representative to Congress: Doyle (D) and Coyne (D); Greenwood (R) and Borski (D). *See* LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1209-10 (Dft. Ex. 2).

33. The Senate rejected Senator O'Pake's amendment by a 27-22 vote. LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1211 (Dft. Ex. 2).

34. The Senate passed SB 1200 with Senator Brightbill's amendment (PN 1621) by a 27-22 vote. LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1211 (Dft. Ex. 2).

35. The version of SB 1200 passed in December by the Senate (PN 1621) had a total population deviation of 24. *See* remarks by Senator Brightbill, LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1193-94 (plan has a "deviation of about 11 or 12 per district, so there is virtually no district-by-district deviation") (Dft. Ex. 2); *see also* Dft. Ex. 8 (map and data summary for SB 1200, PN 1621 showing population deviation of 24).

36. The version of SB 1200 passed by the Senate (PN 1621) had two seats in which no incumbent representative to Congress resided –one in the Southwest and one in the Southeast and paired the residences of (1) Doyle and Coyne, (2) Mascara (D) and Murtha (D), (3) Kanjorski (D) and Holden (D), and (4) Borski

(D) and Hoeffel (D). LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1194 (Dft. Ex. 2).

37. The proposed policy of creating two open seats was explained by Senator Brightbill as follows:

I would note that Congressional District 3, as proposed, reflects the population surge in the southeastern and central Pennsylvania portions of our State, and the 18th Congressional District reflects changes in voting patterns that are occurring in the southwestern portion of our State.

LEGISLATIVE JOURNAL – SENATE (Dec. 10, 2001) at 1199 (Dft. Ex. 2).

38. During the House's third consideration of SB 1200 PN 1621, the Majority Leader, Representative Perzel (R), offered amendment A4858. *See* LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 1 (Dft. Ex. 3).

39. The House agreed to Representative Perzel's amendment by a vote of 164 – 34, with many Democrats, at the urging of the Minority Leader, Representative DeWeese (D), voting for the amendment. *See* LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 12 ("I am going to vote in favor of the Perzel amendment") (DeWeese), 13 (Dft. Ex. 3).

40. After adoption of Representative Perzel's amendment, Representative DeWeese moved to suspend the House Rules in order to offer amendment A4848 to SB 1200, but the motion failed by a vote of 101 - 95. *See* LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 13-14 (Dft. Ex. 2).

41. The amendment sought to be offered by Representative DeWeese had a population deviation of 143, maintained two minority-majority districts in the Philadelphia area, created an open seat and paired the residences of (1) Doyle and Coyne, (2) Pitts (R) and Weldon (R), and (3) Platts (R) and Gekas (R). *See* Dft. Ex. 17, 18.

42. The House passed SB 1200 with Representative Perzel's amendment (PN 1627) by a 142 – 56 vote, with 53 Democrats voting for the bill. *See*

LEGISLATIVE JOURNAL – HOUSE (Dec. 12, 2001) at 17-18 (Dft. Ex. 3) & Certification of party affiliation of members of the House (Dft. Ex. 72).

43. The version of SB 1200 passed by the House (PN 1627) had a total population deviation of 19, maintained two minority-majority districts in the Philadelphia area, created one open seat in the southeast, and paired the residences of (1) Doyle (D) & Coyne (D), (2) Hoeffel (D) & Borski (D) and (3) Holden (D) & Kanjorski (D). *See* Dft. Ex. 10.

44. On December 12, 2001, the Senate declined to concur in the House amendment to SB 1200. *See* Bill History of SB 1200 (Dft. Ex. 1).

45. In the process of resolving the differences between the chambers, a team of cartographers began working. Once the differences between the House and Senate plans had been resolved, the cartography team sought to minimize population deviation while keeping precinct splits to a minimum. *See* Tr. Vol. III: 295-298 (Memmi).

46. To accomplish their task the cartographers first moved as many whole precincts as could be located in the time available (over the New Year's weekend); through that process, they managed to achieve the ideal population in three districts, but a total population deviation of 1,134 remained. Tr. Vol. III: 295-297 (Memmi); Dft. Ex. 98.

47. The cartographers next evaluated splitting precincts, by census blocks, on the boundaries of the districts. They made adjustments in population by trading census blocks between congressional districts; through that process, they managed 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:297 (Memmi); Dft. Ex. 98.

48. On January 2, 2002, the Conference Committee on SB 1200 reported a version agreed to by four of the six members from the two chambers. *See* Bill History of SB 1200; SB 1200, PN 1645 (Dft. Ex. 1, 11, 53).

49. On January 3, 2002, the Senate, after debate, passed the Conference Committee Report on SB 1200 by a 28-22 vote. *See* Bill History of SB 1200 (Dft. Ex. 1); LEGISLATIVE JOURNAL – SENATE (Jan. 3, 2002) at 1297 (Dft. Ex. 5).

50. On January 3, 2002, the House, after debate, passed the Conference Committee Report on SB 1200 by a 139 - 52 vote, with 42 Democrats voting in favor of the bill. *See* Bill History of SB 1200 (D. Ex. 1); LEGISLATIVE JOURNAL – HOUSE (Jan. 3, 2002) at 16 (Dft. Ex. 4); and Certification of party affiliation of members of the House (Dft. Ex. 72).

51. After certification by the Presiding Officers of the Senate and House, SB 1200 was forwarded to Governor Schweiker, who, on January 7, 2002, signed

SB 1200 into law as Act No. 2002-1 ("Act 1"). *See* Enrolled Bill (D. Ex. 53); *see also* Bill History of SB 1200 (Dft. Ex. 1).

Act 1

52. Act 1 created 19 congressional districts with a total population deviation of 19. Under Act 1 the largest district is 9 individuals over the "ideal" and the smallest district is 10 individuals under the "ideal." Act 1 also maintained majority-minority districts for two seats in the City of Philadelphia, protected the dean of the Pennsylvania delegation (Congressman Murtha), created an open seat in acknowledgment of the population growth in the southeast part of the state, and paired the residences of four incumbents who had not announced an intent to retire: Borski (D) & Hoeffel (D) in new District 13 and Gekas (R) & Holden (D) in new District 17. *See* LEGISLATIVE JOURNAL – HOUSE (Jan. 3, 2002) at 15 (Dft. Ex. 4); Dft. Ex. 12, 99.

53. Act 1 embodies a number of compromises between the House and Senate on legitimate, political and legislative goals, e.g., the creation of only one open seat in an area of population growth; the pairing of a Republican and Democrat incumbent, rather than two pairings of Democrat incumbents who had not announced retirement; and the unpairing of the residences of incumbents Mascara and Murtha, and the reconfiguration of Murtha's district, to further enhance the protection of Congressman Murtha.⁴

54. Of the 19 districts put in place under Act 1, voter registration figures for the districts as of 2000 show that 7 have a majority Republican registration and 7 have a majority Democrat registration. Of the remaining 5 districts, 3 have a

⁴ However, a candidate for Congress may run for any seat in the state. Congressman Mascara (D), who lives in the new 18th District, subsequently decided to run against Congressman Murtha (D) in the new 12th District. Tr. Vol. III: 261, 268 (Mascara).

plurality Republican registration and 2 have a plurality Democrat registration, as shown by the registration percentages for each of the 19 districts illustrated below:

Congressional District	Republican Registration	Democrat Registration	Other
1	19.69%	73.96%	6.35%
2	13.65%	78.65%	7.70%
3	44.05%	46.89%	9.06%
4	38.55%	51.74%	9.71%
5	50.88%	38.86%	10.26%
6	49.87%	35.92%	14.21%
7	62.03%	26.55%	11.42%
8	48.75%	37.50%	13.75%
9	52.90%	38.28%	8.82%
10	52.06%	38.86%	9.08%
11	34.92%	55.96%	9.12%
12	27.30%	65.74%	6.96%
13	47.79%	42.88%	9.33%
14	17.31%	74.04%	8.65%
15	41.98%	44.43%	13.59%
16	57.52%	28.47%	14.01%
17	52.87%	36.86%	10.27%
18	37.05%	53.55%	9.40%
19	54.11%	33.04%	12.85%

Certification of Kathy A. Sullivan of Voter Registration with 2001 Congressional Districts (Dft. Ex. 56).

55. Under Act 1, Montgomery County is split among six congressional districts, with the largest portion in the 13th district. *See* Section 1 of Act 1 (Legal Description). Under the court-ordered 1992 plan, Montgomery County was split among five congressional districts, with the largest portion in the 13th district. *See* Plt. Ex. 1.

56. Under Act 1, splits of political subdivisions are concentrated on the borders of District 12, the safe district created for Congressman Murtha. *See* Act 1 legal description and map (Dft. Ex. 11, 12); Tr. Vol. III: 257-258 (Mascara).

57. Under Act 1, six precincts are split by assigning the census blocks within the precincts to different congressional districts. These splits affect 6 counties, 6 municipalities and 9 of the 19 congressional districts. Dft. Ex. 98. Under the court-ordered 1992 plan, three precincts were split by assigning census blocks within the precincts to different congressional districts. *See Mellow v. Mitchell, Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992) at Appendix A.

Good Faith and Justification

58. No plan was before the General Assembly with a lower total population deviation than 19. Dft. Ex. 2, 3, 4, 5, 8, 10, 12, 15, 17.

59. The total population deviation of 19 in Act 1, which calculates to a 0.00% deviation, was the result of the General Assembly's good faith effort to minimize population deviation, while achieving legitimate legislative goals. *See* Findings 19-50.

60. The cartographers who finalized the plan that became Act 1 worked to minimize the population deviation, while avoiding splits in precincts. The cartographers performed their work without anyone overruling their decisions for political reasons. *See* Tr. Vol. III: 298 (Memmi).

61. A hypothetical plan known as "Act 1, Mod 1" was developed and presented to the Court by Dr. John Memmi, one of the cartographers who finalized the district boundaries in Act 1. After two full days of working to find census blocks to trade along the borders of the districts in Act 1, Dr. Memmi achieved in "Act 1, Mod 1" a total population deviation of 1 (the lowest number that can be achieved without splitting individuals since 19 does not divide evenly into Pennsylvania's total population under the 2000 Census). However, while "Act 1,

Mod 1" largely respects the boundaries of congressional districts as set by the General Assembly, "Act 1, Mod 1" requires the splitting of 26 voting precincts in 12 counties, in 16 municipalities and in 17 congressional districts. Dft. Ex. 90, 99.

62. Splitting precincts creates additional costs and work for county election officials in all counties where they occur, in acquiring voting machines, in customizing ballots, in training precinct officials, in registering voters and in counting ballots. Tr. Vol. III: 342-343, 345, 349, 350-351 (Marion).

63. Splitting precincts increases the potential for voter confusion. Tr. Vol. III:352-353 (Marion).

64. Splitting precincts increases the potential for candidate confusion wherever they occur. Tr. Vol. III: 344 (Marion).

65. In a primary election, a split precinct could require six or more different ballots to be distributed (two for each party and two for independent voters on ballot questions), increasing the potential for error in assigning, casting or counting ballots. Tr. Vol. III: 344 (Marion).

66. The General Assembly uniformly and consistently attempted to avoid precinct splits in all the districts created by Act 1, and its cartographers managed to "zero" three districts without splitting precincts. Tr. Vol. III: 296-298 (Memmi); Dft. Ex. 98.

67. Robert Priest, an employee of the Commonwealth, who provides demographic services to the House Democrat Caucus, gave litigation support to Plaintiffs at public expense. Tr. Vol. I: 36 (Priest).

68. Mr. Priest produced a number of alternative redistricting plans that were not put before the General Assembly by his superiors in the House Democrat Caucus. Tr. Vol. I:12, 63-65 (Priest); *see also* Dft. Ex. 2, 3, 4, 5.

69. Mr. Priest prepared an alternative to Act 1 that was supposed to have zero population deviation. However, the legal description of this proposal, if it had

been enacted into law, would have produced an overall population deviation of 2,931. *Cf.* Plt. Ex. 4A (legal description, offered but withdrawn by Plaintiffs) and Plt. Ex. 21 (population tallies for Districts 1 and 2, regarding the 23rd Ward, precincts 11 and 12) and Tr. Vol. I: 57-61(Priest).

70. In any event, Plaintiffs' putative zero deviation plan incorporated political objectives of its own that were never considered on the floor of either house of the General Assembly. For example, it would have combined the residences of two freshmen Republican members of Congress into a district that resembles a bison lying on its back. The foreleg of the bison, extending up into the Appalachian Mountains of Pennsylvania, would have contained one member's home, while the tail of the bison, stretching into southcentral counties, would have picked up the residence of another Republican member. Plt. Ex. 4.

71. Politics is an accepted part of the redistricting process. Tr. Vol. I: 70:23-71:6, 72:11-73:8 (Priest).

72. Political goals inform the redistricting process and, without them, an infinite number of plans could be generated by a computer, including any number of zero-deviation, but abstract and politically infeasible, proposals. Tr. Vol. I: 71:7-19 (Priest).

73. The deviation of population in Act 1 is minimal, while achieving the important goal of minimizing voting precinct splits.

74. By way of comparative illustration, the 19 person deviation in Act 1 is 0.00%, whereas, nationally the deviation between the most and least populous congressional districts is 408,413 or 63%. The latter, of course, is constitutionally incurable. *See* Dft. Ex. 79 (Statistical Abstract of the United States, Tables 18 and 384); *see also* U.S. CONST. art. I, §2.

Alleged Partisan Bias

75. Act 1 represents a bi-partisan compromise that resolved a political impasse between the Pennsylvania Senate and House. The enactment of the compromise required bi-partisan support in the House. Not enough Republican House members supported the Conference Committee report to achieve a constitutional majority.⁵ Accordingly, SB 1200 would not have become law without the 42 House Democrats who voted for it. (Inferences from findings above.)

76. The political compromise that resulted in Act 1 does not somehow taint the statute. The General Assembly represents the people of the Commonwealth and is the forum, delegated by Article I, section 4 of the United States Constitution, with the responsibility for congressional redistricting.

77. Partisan politics are an integral part of the enactment of legislation, including congressional redistricting.

78. Plaintiffs attempted to show that Act 1 has a high degree of partisan bias.

79. Even if the partisan bias that Plaintiffs alleged had been proven to exist in Act 1, it would not nullify the good faith efforts of the General Assembly, made in parallel with the political process, to minimize both the population deviation and precinct splits.

80. Plaintiffs did not succeed in demonstrating the high degree of partisan bias that they alleged.

81. Plaintiffs' expert, Dr. Alan Lichtman, offered an analysis of the partisan impact of Act 1 based on an attempt to allocate the votes in 19 actual

⁵ Under the Pennsylvania Constitution, votes of a majority of elected members (i.e., 102 of the 203 members of the House) are required for final passage of a bill. PA. CONST., art. III, § 5.

statewide elections since 1991 into both the old 21 congressional districts and the new 19 congressional districts.⁶ *See* Plt. Ex. 12 and 13.

82. Dr. Lichtman contended that Act 1 had a partisan bias of 24%, because the Republican and Democrat parties had almost evenly split the votes in the 19 races (calculated by averaging the percentage of votes in each of the 19 races), yet 74% of the new districts under Act 1 lean towards the Republicans. *See* Tr. Vol. I:96 (Lichtman) and Plt. Ex. 12.

83. Dr. Lichtman's methodology was flawed, because the results of his reaggregation of the 19 races into the 21 old congressional districts did not reflect historical reality. His attempt to "predict the past" over the last decade of elections showed that there should have been 12 of 21 seats, i.e. 57.1%, that were Republican. Yet over the past decade, when the 19 statewide races used in his analysis occurred, the Republicans won only 51 out of 105 congressional races, or 48.6%, and for most of the decade held only 10 out of 21 seats. *Cf.* Plt. Ex. 12 (Table 1 of the Lichtman analysis) and Dft. Ex. 60-64 (actual results of congressional elections).

84. As Defendants' expert, Dr. Thomas Brunell, testified that if the Lichtman analysis could not reliably "postdict," then it could not reliably predict, using the same data and methods. Although Dr. Lichtman did not claim to be actually predicting the outcome of elections, his analysis does not suffice to identify partisan bias. *See* Tr. Vol. IV:10-11 (Brunell).

85. Dr. Lichtman's conclusion, furthermore, is at odds with the actual outcomes of the 19 statewide races that he used. Of those elections, Republicans won 12, or 63.2%. Because the races were statewide and not by district, there could not have been partisan bias. Republican candidates simply won substantially

⁶ The analysis was based on a compilation of data by Mr. Priest that had facial errors and lacked an evidentiary foundation, as discussed below.

more elections than Democrats, so that, at present, Republicans hold both of Pennsylvania's seats in the United States Senate, the Governorship, all but one of the statewide "row offices" of Attorney General, Auditor General and Treasurer. There is only one Democrat in Pennsylvania who holds statewide office *See* Dft. Ex. 60-65.

86. Dr. Lichtman excluded many statewide elections in Pennsylvania without testing them to see if they would correlate with historical congressional elections. In these odd-year statewide races for appellate court seats, the Republicans won 7 out of 7 races in 2001 alone, winning 53.65% of the total statewide vote. *See* Dft. Ex. 66.

87. National Republican candidates (i.e., for President) have not fared as well in Pennsylvania as in-state Republican candidates. Among the 19 races used by Dr. Lichtman, 3 of the 7 Democrat victories were in the three Presidential contests during the decade. As Dr. Brunell opined, this may indicate a "disjunct" between the state and national Republican parties. However, this phenomenon would also further devalue the Lichtman methodology: if only in-state candidates are compared, the Republicans won 12 out of 16 races, or 75%. *See* Tr. Vol. IV:33 (Brunell).

88. The 19 reagggregated races used by Dr. Lichtman also show that Act 1 conforms to a basic majoritarian principle: in every election, the candidate who won the statewide popular vote also won a majority of the hypothetical congressional districts under Act 1. *See* Dft. Ex. 89; Tr. Vol. IV: 13-15 (Brunell).

89. As Dr. Brunell demonstrated, conformance to the majoritarian principle can be illustrated on a graph, where the x axis is the percentage of statewide votes the candidate received and the y axis is the percentage of hypothetical seats garnered by the candidate when the votes are reagggregated into the congressional districts. The graph is divided into quadrants at the 50% mark of

the axes. A redistricting plan that conforms to the majoritarian principle should produce election results for each party that fall either into the lower left quadrant (i.e., less than 50% of votes gets less than 50% of seats) or upper right quadrant (i.e., more than 50% of votes gets more than 50% of seats). The 19 reaggregated races used by Dr. Lichtman would all fall entirely within the majoritarian quadrants of the graph. *See* Dft. Ex. 89, Plt. Ex. 11; Tr. Vol. IV: 15-18 (Brunell).

90. Plaintiffs did not demonstrate significant partisan bias through any of their other efforts. Their comparison of the compactness of the districts under Act 1 to compactness under other plans was not shown to be materially connected to partisan bias. Moreover, Plaintiffs' witnesses who testified about compactness, Mr. Priest and Dr. Lichtman, did not know what algorithms had been used for calculating compactness, either on a perimeter or dispersion basis, and Dr. Lichtman acknowledged that there was dispute in the professional literature over the methods and significance of compactness calculations. *See* Tr. Vol. I: 37-40; III: 163-64, 167-68 (Lichtman). Dr. Lichtman's attempt to rank plans gave cumulative scores to the alternative plans by simply adding the rankings of each plan under six separate criteria. By adding rankings from dissimilar criteria Dr. Lichtman produced a cumulative rank for each plan that is merely a number achieved through simple addition, not a useful insight into partisan bias. *See* Tr. Vol. IV: 20-21 (Brunell). Plaintiffs' witness on party politics, Mr. Ceisler, had opinions based, *inter alia*, on "talking to people" and "reading the papers," but had not done any polling or surveys based on Act 1. Moreover, Mr. Ceisler lacked detailed knowledge of the electoral districts and political geography about which he was opining. His opinions cannot be used to support Plaintiffs' contentions.

II. FINDINGS OF FACT ON EVIDENTIARY ISSUES

Relevance

91. The sole remaining issue for the Court's consideration is Plaintiff's Claim I, challenging the compliance of Act 1 with the principle of one-person, one-vote. February 22, 2002 Order (granting in part and denying in part Defendants' Motions to Dismiss).

92. Plaintiffs called Mr. Bob Priest, Dr. Allan Lichtman, Congressman Frank Mascara, and Larry Ceisler to testify as to the partisan effects of Act 1. Tr. at 33 (Smith). Defendants objected to the testimony of these witnesses on the grounds that the partisan effects of Act 1 was irrelevant to Plaintiffs' one-person, one-vote claim. Tr. Vol. I:32-34 (Krill); Vol. I:90 (Krill); Vol. II:167 (Krill). Defendants objected to the testimony of each witness and the exhibits which formed the basis for or illuminated that testimony. Tr. Vol. I: 33 (Krill); Vol. I: 81 – 84 (Krill) & Vol. III: 250 (including Plt. Ex. 2C, 2D, 13, 3, 3A, 4, 4A, 4B, 4C, 12).

93. Plaintiffs' Exhibit 4A, the legal description of Plaintiffs' Alt 4 ("zero-deviation") plan was withdrawn and not re-introduced. Tr. Vol. I: 79 (Smith).

Foundation – Lay Witness Testimony

94. Mr. Priest created several alternative redistricting plans –Alt. 1, 2, 3, and 4. Tr. Vol. I:12 (Priest).

95. Mr. Priest testified concerning the compactness scores of Act 1 and Alt. 1-4. The basis of his testimony were the results computed by a computer program entitled "AutoBound." Tr. Vol. I:15 (Priest). Defendants objected to the testimony concerning compactness and the first three pages of "compactness analysis" of Plt. Ex. 13 on the grounds that Mr. Priest lacked personal knowledge of the method of determining compactness, lacked knowledge of issues surrounding compactness determination, and relevancy. Tr. Vol. I:81-82 (Krill).

96. Mr. Priest lacks any personal knowledge of the methods on which compactness is computed and issues surrounding compactness determination. Tr. Vol. I:37-40 (Priest).

97. Mr. Larry Ceisler testified as to the political forces which led Congressman Mascara to run in District 12 rather than District 18. Tr. Vol. II: 203 (Ceisler). Defense counsel objected to this testimony as lacking foundation and potentially eliciting hearsay evidence. Tr. Vol. II:203 (Krill).

98. Mr. Ceisler offered no basis for his opinion concerning the political forces which led Congressman Mascara to choose to run in District 12.

99. Mr. Ceisler testified that state Senator Murphy will be the Republican candidate in District 18. Tr. Vol. III:203 (Ceisler). Defense counsel objected to this statement as lacking a proper evidentiary foundation. Tr. Vol. II:203 (Krill).

100. The only basis for Mr. Ceisler's statement that Senator Murphy will be the Republican candidate in District 18 was hearing and/or reading reports of Senator Murphy's announcement. Tr. Vol. II:204 (Ceisler).

101. Mr. Ceisler testified that Dick Arney will travel to Pennsylvania to support Senator Murphy and that Senator Murphy is favored by the Republicans in Washington, D.C. Tr. Vol. II:203-04 (Ceisler). Defense counsel objected to these statements as lacking a proper evidentiary foundation. Tr. Vol. II:204 (Krill).

102. Mr. Ceisler offered no basis for his statements concerning Mr. Arney and Senator's Murphy's basis of support. *See* Tr. Vol. II:204 (Ceisler).

103. Congressman Mascara testified that the districts of Act 1 were drawn to create seats for state Senators Murphy and Gerlach. Tr. Vol. III: 258 (Mascara). Defense counsel objected to these statements as lacking a proper evidentiary foundation and as hearsay. Tr. Vol. III: 259 (Krill).

104. Congressman Mascara testified that a "supercomputer" at Carnegie Mellon was used in the configuration of Act 1. Tr. Vol. III: 258 (Mascara).

Defense counsel objected to this statement as lacking a proper evidentiary foundation. Tr. Vol. III: 259 (Krill).

105. Congressman Mascara testified that the 18th District was designed for certain purposes. Tr. Vol. III: 258, 260 (Mascara). Defense counsel objected to this statement on the grounds of hearsay and lack of foundation. Tr. Vol. III: 258, 260-261 (Krill).

106. Congressman Mascara testified that "they" took a Peters Township (Washington County) out of his district in order "to accommodate a seat they were trying to create." Tr. Vol. III: 256 (Mascara). Defense counsel objected to this testimony on hearsay grounds. *Id.* (Krill).

107. The only basis adequately offered for Congressman Mascara's statements in Findings 103-106 was his own statement that "I am repeating what I have heard and what I have read in the newspapers." Tr. Vol. III:67 (Mascara).

Hearsay

108. Dr. Lichtman testified that off-year judicial elections are not available in electronic form. Tr. Vol. II:184 (Lichtman). His basis for that testimony was that Mr. Priest had so told him. Tr. Vol. II:185 (Lichtman). Defense counsel objected to this testimony as hearsay and moved to strike. Tr. Vol. II:185 (Krill).

109. Mr. Ceisler testified that Melissa Brown is favored by the Republican party and is the "presumptive Republican candidate" for District 13. Tr. Vol. III:271 (Ceisler). Defense counsel objected to this testimony as hearsay. *Id.*

110. Mr. Ceisler's statements concerning Melissa Brown were based upon his reading of her endorsement letters from the region's Republican Congressmen and Senator Santorum – letters which were not introduced at trial. *See* Tr. Vol. III:211 (Ceisler). Mr. Ceisler's only other bases for his statements were hearing from unnamed sources that Ms. Brown will be endorsed by the Montgomery

County Republican Committee and is using Senator Santorum's media consultant. *See id.*

111. Congressman Mascara attempted on several occasions to offer statements to which defense counsel objected to as hearsay. *See Findings 103-107.*

Foundation – Expert Testimony

112. Mr. Ceisler testified as to the likely impact of the political makeup of the 2002 Congressional delegation and the outcome of each of the races in the 19 districts. Tr. Vol. II:200-201 (Ceisler). Defense counsel objected to this testimony as lacking a proper evidentiary foundation. Tr. Vol. II:200-01 (Krill).

113. Mr. Ceisler generally relied upon several factors in coming to this conclusion: (1) polling data; (2) "talking to people in the area to see what they say;" (3) "talking to the campaigns;" (4) newspapers; (5) examining fundraising; (6) what the candidates "are like;" (7) the issues; (8) whether an incumbent is running; (9) the characteristics of the area; (10) voter performance; and (11) voter registration. Tr. Vol. II:199-200. (Ceisler).

114. Mr. Ceisler could not articulate a methodology or formula by which he took the above factors and used them to reach his conclusion about the potential outcome of each of the 19 Congressional races. *See e.g.*, Tr. Vol. III: 233, 245-248 (Ceisler).

115. Mr. Priest testified that the "elections database" which formed the basis of his testimony, the exhibits created by him and Dr. Lichtman's analysis, testimony and exhibits, was modified from a database obtained from the Legislative Data Processing Center ("LDPC"). Tr. Vol. I:12 (Priest). To create the "elections database," he reallocated the elections results contained in the LDPC database 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 his subjective reallocation of vote totals from old precincts into the new precincts "by hand." Tr. Vol. I:51 (Priest).

116. Plaintiffs' "election database" formed the basis of Dr. Lichtman's analysis, testimony, and Plt. Ex. 12 (Tables 6-12), 13; Tr. Vol. II:160, 164, 172, 174, 178-79 (Lichtman). Dr. Lichtman was not provided the raw data from LDPC, and can not duplicate Plaintiff's "election database." Tr. Vol. II:159-60, 164, 172-74, 178-79 (Lichtman).

117. Plaintiffs' "elections database," (the basis for Mr. Priest's testimony, Mr. Priest's reaggregation of 19 statewide elections, Dr. Lichtman's analysis and testimony, and Plt. Ex. 12 & 13) was neither provided to Defendants nor introduced into evidence at trial. *See* Tr. Vol. II:173 (Krill/Lichtman).

118. Plaintiffs offered no foundational evidence for the data summaries derived from their "elections database." *See* Tr. Vol. I-II:1-192 (Priest/Lichtman).

119. Plaintiff's summaries of statewide elections differs significantly from data maintained and certified by the official public custodian of election records, the Secretary of the Commonwealth. Tr. Vol. I:48-50 (Priest); *compare* Dft. Ex. 60-65 (General Election Results of years 2000, 1998, 1996, 1994, 1992, and 1991, respectively) *with* Plt. Ex. 13 at 11-14; *see also* Dft. Ex. 89. The summaries are inaccurate and erroneous. *See id.*

120. Because Plaintiffs' "election database" is not in evidence, neither the court nor the parties can determine the source or degree of error that may be incorporated into the reaggregation of 19 races performed by Mr. Priest and used by Dr. Lichtman.

121. Dr. Lichtman's methodology, as a whole, has not been peer-reviewed. His attempts to correlate his reaggregated statewide races to congressional races were flawed, because he failed to report a constant for his regression analysis and failed to report the sensitivity tests that he claimed, on cross-examination, that he

had done, contrary to standard practice in his field. In attempting to establish correlations, he also dropped uncontested congressional races, which resulted in eliminating three times as many sets of Republican votes than Democrat, without testing for resulting bias.

Foundation – Documentary Evidence

122. Plaintiffs failed to offer foundational evidence for their data summaries which they allege were derived from their "elections database," but which contain facial discrepancies from official vote totals. Plt. Ex. 13; *see* Finding 117-120. Defendants objected to Plt. Ex. 12 & 13 as lacking foundation. Tr. Vol. I:81-82; Vol. III: 250 (Krill).

123. Plaintiffs failed to offer any foundational testimony for the compactness scores for Act 1 or any other proposed plans. *See* Plt. Ex. 13, 1-3, 16-18, 23-25, 34-36, 45-47, 55-57. Defendants objected to the admission of the compactness score compilations as lacking foundation. Tr. Vol. I:81-82 (Krill).

III. CONCLUSIONS OF LAW ON SUBSTANTIVE ISSUES

1. Plaintiffs bear the burden of proving that Act 1 is unconstitutional.
2. Article I, section 4 of the United States Constitution places in the legislature of each of the States the exclusive responsibility for the "times, places and manner of holding elections for [] representatives," except as Congress may direct otherwise." U.S. CONST. art. I, §4.
3. The congressional redistricting process is an inherently political process. *See White v. Wieser*, 412 U.S. 783 (1973).
4. If a plan does not constitute unconstitutional partisan gerrymandering then any partisan intent or effect that it may have is *per se* constitutional, i.e., any partisan politics leading to a duly-enacted congressional redistricting plan is either

constitutional or unconstitutional and there is no middle ground that is judicially cognizable. *See* Presiding Officers' Brief at Argument Section II.B.2.

5. Partisan bias in a congressional redistricting plan, in the absence of unconstitutional partisan gerrymandering under the standard of *Bandemer v. Davis*, 478 U.S. 129 (1986), is not a basis for finding that a legislature did not act in good faith to minimize population deviations or for invalidating a legislature's justification for minimal population deviations. *Anne Arundel Co. Republican Central Committee v. State Advisory Bd. of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), *aff'd* 504 U.S. 938 (1992). *See also* Presiding Officers' Brief at Argument Section II.B.2.

6. Plaintiffs failed to establish a lack of good faith effort on the part of the Pennsylvania General Assembly to enact a congressional redistricting plan with minimal population deviation. *See* Presiding Officers' Brief at Argument Section II.A.2.

7. Act 1 represents a good faith effort by the General Assembly to enact a congressional redistricting plan with minimal population deviation. *See* Presiding Officers' Brief at Argument Section II.A.2.

8. The smaller the population deviation in a duly-enacted congressional redistricting plan, the less needed to justify it. *Karcher v. Daggett*, 462 U.S. 725, 741 (1983). *See* Presiding Officers' Brief at Argument Section II.B.1.

9. Avoiding precinct splits is a legitimate and neutral justification for population deviations in a duly-enacted congressional redistricting plan. *See* Presiding Officers' Brief at Argument Section II.B.2.

10. Evidence of partisan bias is not relevant to a claim that a duly-enacted congressional redistricting plan is unconstitutional under the one-person, one-vote principle. *See* Presiding Officers' Brief at Argument Section II.B.2.

11. Plaintiffs Richard and Norma Jean Vieth lack standing to pursue this action because, under Act 1, they reside in a district that is underpopulated and therefore, their vote is not diluted. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *United States v. Hays*, 515 U.S. 737 (1995).

12. Act 1 is the duly-enacted law that puts in place the districts in which elections will be held to fill the 19 congressional seats allocated to Pennsylvania under the 2000 Census.

13. If a duly-enacted congressional redistricting plan is declared unconstitutional, the state legislature must be provided with an opportunity to enact a constitutional plan before a court undertakes the process. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also* Presiding Officers' Brief at Argument Section III.A.

14. In the event that a court, after giving the legislature an opportunity to cure a constitutionally defective plan, undertakes to draw a plan itself, the court must give great deference to the legislative goals of the duly-enacted plan, whether or not those goals are political. *See White v. Wieser*, 412 U.S. 783, 795 (1973); *Upham v. Seamon*, 456 U.S. 37 (1982); *see also* Presiding Officers' Brief at Argument Section III.B.

IV. CONCLUSIONS OF LAW ON EVIDENTIARY ISSUES

Relevance

15. Fed. R. Evid. 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401.

16. Under Fed. R. Evid. 402, evidence which is not relevant is not admissible. Fed. R. Evid. 402.

17. Under *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983): there are "two basic questions [that] shape litigation over population deviations in state

legislation apportioning congressional districts" –"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 [and] if [] 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."

18. The "good-faith effort" requirement of *Karcher* is satisfied if the General Assembly did not have before it, and reject, a redistricting plan with a lower population deviation than Act 1 and did not otherwise manifest an intent to minimize deviation while pursuing legitimate secondary goals. *See Karcher*, 462 U.S. at 739; *Stone v. Hechler*, 782 F. Supp. 1116 (W.D. W. Va. 1992); *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). *See also* Presiding Officers' Brief at Argument Section II.A.

19. Whether the General Assembly undertook "good faith effort" does not involve a consideration of whether partisan politics played a role in Act 1. *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).

20. The testimony of Bob Priest, Dr. Alan Lichtman, Congressman Frank Mascara and Larry Ceisler addressing the partisan effects of Act 1 are not relevant to Plaintiff's one-person, one-vote claim under *Karcher* and its progeny.

21. Defendants' relevancy objection to the testimony of Bob Priest, Dr. Alan Lichtman, Congressman Mascara, and Larry Ceisler (and the exhibits therein referred) concerning the partisan effects of Act 1 should have been sustained and their testimony and exhibits is stricken from the record.

Foundation – Lay Witness Testimony

22. Fed. R. Evid. 602 provides, in part, "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

23. The personal knowledge of a lay witness is the "foundation" for his or her evidentiary testimony. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F3d 1153, 1175 (3d Cir. 1993). In the absence of personal knowledge, no foundation for the lay testimony exists, and the testimony must be excluded as irrelevant. *See Owen v. Patton*, 925 F.2d 1111, 1113 (8th Cir. 1990).

24. Because Mr. Priest lacks any personal knowledge of the method by which "Auto Bound" computed various compactness scores, his testimony lacks a proper evidentiary foundation and is inadmissible and, therefore, stricken from the record.

25. Because Mr. Ceisler lacks personal knowledge of the motivations behind Congressman Mascara's choice to run in District 12 instead of District 18, his testimony lacks a proper evidentiary foundation and is inadmissible and, therefore, stricken from the record.

26. Because Mr. Ceisler lacks personal knowledge of the whether state Senator Murphy will be the Republican candidate in District 18, his testimony lacks a proper evidentiary foundation and is inadmissible and, therefore, stricken from the record.

27. Because Mr. Ceisler lacks personal knowledge of whether Dick Armey will travel to Pennsylvania to support Senator Murphy and whether Senator Murphy is favored by the Republicans in Washington, D.C., his testimony lack a proper evidentiary foundation and is inadmissible and, therefore, stricken from the record.

28. Because Mr. Mascara lacks personal knowledge of how or why the districts of Act 1, including District 18, were drawn, his testimony on that point is inadmissible and, therefore, stricken from the record.

29. Because Congressman Mascara lacks personal knowledge whether a "supercomputer" at Carnegie Mellon University was used in the configuration of Act 1, his testimony is inadmissible and, therefore, stricken from the record.

Hearsay

30. Fed. R. Evid. 801(c) defines hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

31. Hearsay testimony is "'inherently untrustworthy: the declarant may not have been under oath at the time of the statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross examined.'" *United States v. Console*, 13 F.3d 641, 656 (3d Cir. 1993) (quoting *United States v. Pellulo*, 964 F.2d 193, 203 (3d Cir. 1992)).

32. Mr. Lichtman's testimony that Mr. Priest told him that off-year judicial election data is not available in electronic form is hearsay.

33. Mr. Ceisler's testimony that Melissa Brown is the "presumptive Republican candidate" is hearsay. *See e.g., Democratic Party v. National Conservative Political Action Comm.*, 578 F. Supp. 797, 833 n.53 (E.D.Pa. 1983), *aff'd in part, rev'd in part on other grounds*, 470 U.S. 480 (1985) (statements quoted in New Yorker magazine purportedly made by Sen. Jesse Helms and others found inadmissible hearsay); *Creo Products v. Presstek, Inc.*, 166 F. Supp.2d 944, 952 (D.Del. 2001) (statements by an employee that he "knew" certain facts only through "meeting people and public sources" inadmissible "classic hearsay").

34. Congressman Mascara's testimony concerning the purposes and methods behind the creation of Act 1, including the use of the computer at Carnegie Mellon University are hearsay. *See id.*

35. Fed. R. Evid. 802 provides that in absence of an applicable exception, hearsay evidence is not admissible. Fed.R.Evid. 802; *AEL Industries, Inc. v. Loral Fairchild Corp.*, 882 F. Supp. 1477, 1487 (E.D. Pa. 1995) (excluding hearsay evidence which failed to fall under any exception); *Taylor v. Plouisis*, 101 F. Supp. 2d 255, 267 (D. N.J. 2000) (same); *Creo Products v. Presstek, Inc.*, 166 F. Supp.2d 944, 952 (D.Del. 2001) (excluding evidence of witness based solely on "meeting people" and "public sources" where it failed to fall under any hearsay exception).

36. The foregoing statements of Mr. Priest, Mr. Ceisler and Congressman Mascara are hearsay not subject to any exception and are therefore stricken as inadmissible. *See* Fed. R. Evid. 803, 804.

Foundation – Expert Witnesses

37. Fed. R. Evid. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

38. Mr. Ceisler's testimony is based upon insufficient facts or data, especially given that much of his testimony should be excluded as hearsay or as lacking a proper foundation under Fed. R. Evid. 802, 602. He also failed to articulate a reliable principle or method by which he took multiple factors and used them to reach a conclusion regarding the electoral outcomes of the 19 districts in the 2002 Congressional elections. Accordingly, Mr. Ceisler's testimony concerning the likely impact of Act 1 on the political makeup of the 2002

Pennsylvania Congressional delegation and which candidates will prevail in the 2002 elections is stricken. Fed. R. Evid. 702.

39. Fed. R. Evid. 703 provides, in part:

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 expert 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.

(Emphasis added.) The reliability standard of Rule 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 (3d Cir. 1994).

40. It is proper to exclude expert testimony that relies and reaches conclusions based on erroneous or incomplete data or facts lacking an adequate foundation of trustworthiness. *See Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1114 (5th Cir. 1991); *United States v. City of Miami*, 115 F.3d 870, 873 (11th Cir. 1997); *Orson, Inc. v. Miramax Film Corp.*, 983 F. Supp. 624, 635 (E.D. Pa. 1997).

41. Evidence which has been altered carries an indicia of untrustworthiness. *SEC v. Hughes Capital Corp.*, 124 F.3d 449, 455-56 (3d Cir. 1997) (affirming district courts' exclusion of photocopies of check stubs as lacking trustworthiness because they had been altered before photocopying and the originals were not produced).

42. Plaintiffs failed to establish a foundation for the admission of the data that served as the basis for compilations, calculations, and the various analyses and conclusions offered by Mr. Priest and Dr. Lichtman and all testimony based upon this data is inadmissible and, therefore, stricken from the record.

Foundation – Documentary Evidence

43. 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.

44. Plaintiffs' summaries of data reaggreated from their "elections database" (Pl. Ex. 13 and Pl. Ex. 12) lack a proper evidentiary foundation and are inadmissible. Fed. R. Evid. 901, 902, 1006; *see* Findings 18-22; *Hughes Capital Corp.*, 124 F.3d at 455-456.

45. Plaintiffs' Ex. 13, 1-3, 15-17, 23-25, 34-36, 45-47 and 55-57 (purported compactness measurements) lack the required evidentiary foundation and are therefore excluded as inadmissible.

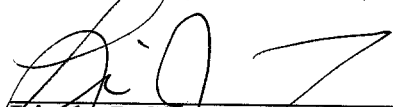
46. Plaintiffs' Ex. 13, 4-7, 9-10, 11-14, 30-33, 41-44, 51-54, 61-64 (reaggreated election results) lack the required evidentiary foundation, derive from altered data that differ from the official database the Legislative Data Processing Center has the public duty to maintain, are untrustworthy and are therefore excluded as inadmissible.

47. The summarized data on which Dr. Lichtman relied in forming his opinions lacks a foundation and cannot in turn provide a foundation for Dr. Lichtman's opinions.

48. The Court should not have excluded Dft. Ex. 54, a self-authenticating exhibit, which, as the data provided by the Legislative Data Processing Center to the four caucuses of the General Assembly, provided the evidentiary basis for the entire case and defense and it is admitted.

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 Proposed Findings of Fact and Conclusions of Law on the following in the manner indicated:

Fax and First class mail

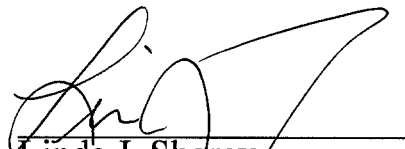
Paul M. Smith
Thomas J. Perrelli
Bruce V. Spiva
Daniel Mach
Brian P. Hauck
JENNER & BLOCK, L.L.C
601 Thirteenth Street, NW
Washington, D.C. 20005
(202) 639-6000
Counsel for Plaintiffs

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