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

RICHARD VIETH, NORMA JEAN VIETH, and SUSAN FUREY, Plaintiffs, v. THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, et al Defendants.	)	No. 1: CV 01-2439 Judge Rambo, Judge Yohn, Judge Nygaard

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION IN LIMINE TO PROHIBIT TESTIMONY CONCERNING THE LEGISLATIVE PROCESS OR MOTIVE

Plaintiffs respectfully submit this Memorandum in opposition to Defendants' motion *in limine* regarding legislative privilege and testimony regarding the legislative process or motive.

Because there are no legitimate explanations for the population deviations and irregular borders of the congressional districts that the Commonwealth imposed in Act 1, Defendants resort to attempting to exclude all evidence of actual intent of the map drawers. By asserting that all testimony of state legislators is prohibited by the legislative privilege, Defendants seek to turn the legislative privilege, a limited shield protecting individual legislators from harassment, into an all-encompassing fortress that

bars the courts from making any serious inquiry to allegedly unconstitutional legislative intent. But such a broad legislative privilege does not exist.

I. LEGISLATIVE IMMUNITY DOES NOT PROHIBIT LEGISLATORS FROM VOLUNTARILY TESTIFYING.

Defendants' Motion should be denied on the simple grounds that the legislative privilege cannot prevent a legislator from voluntarily testifying. Defendants cannot point to a single federal court that has prevented legislators from voluntarily waiving their privilege. The Supreme Court case on which they rely for the proposition, *United States v. Helstoski*, 442 U.S. 477 (1979), involved a legislator who insisted that he had not, in fact, waived his privilege. It did not, like the present case, involve legislators who might actively desire to testify.

In fact, courts that have addressed the issue have overwhelmingly agreed that the privilege is just that – a privilege – and can be asserted or waived. In *Gravel v. United States*, 408 U.S. 606 (1972), the Supreme Court made clear that the privilege was waivable. In ruling that the Speech or Debate protection[1] applied equally to a legislative aide engaged in the legislator's duties, the Supreme Court wrote that the privilege belongs to the legislator and can be invoked by the aide on the legislator's behalf. *Id.* at 621-22. The Court then noted, "It follows that an aide's claim of privilege

1 The Supreme Court has found, at least in the criminal context, that the legislative privilege offers state legislators *less* protection than the Speech or Debate Clause provides to federal legislators. *See United States v. Gillock*, 445 U.S. 360, 369-73 (1980) (reasoning that the policies underlying the Speech or Debate Clause do not justify similar protection for state legislators). Accordingly, to the extent that the Speech or Debate Clause would not provide a U.S. Senator certain protection, the common law legislative immunity can provide a state legislator even less.

can be repudiated and thus waived by the Senator." *Id.* at 622 n.13. Should Plaintiffs call one or more legislators to testify at the March 11-12 hearing, those legislators will be free to assert the privilege when relevant or waive it by voluntarily testifying. *See, e.g., Government of Virgin Islands v. Lee*, 775 F.2d 514, 524 (3d Cir. 1985) ("Since Senator is asserting a legislative privilege, the burden of establishing the applicability of legislative immunity, by a preponderance of the evidence, rests with him."); *United States v. McDade*, 827 F.Supp. 1153, 1169 (E.D. Pa. 1993), *aff'd*, 28 F.3d 283 (3d Cir. 1994) ("Just as a member of Congress is entitled to the privilege against the will of the entire House, he or she would also seem to be entitled to waive that privilege.").

This has been made clear in the Third Circuit as recently as the Third Circuit's decision in *Powell v. Ridge*, 247 F.3d 520 (2001), a case in which the current Defendants – represented by their current counsel – argued that their intervention in a case was not a sufficiently explicit waiver of their legislative immunity. In a concurring opinion, Judge Roth wrote, "***Although they certainly recognize that legislative immunity may be waived***, *see Government of the Virgin Islands v. Lee*, 775 F.2d 514, 520 n.7 (3d Cir. 1985); *Burtnick* [*v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996)], the Legislative Leaders suggested at oral argument that intervening did not waive their privilege because any such waiver was not sufficiently explicit." (emphasis added). Plaintiffs assume Judge Roth accurately described the

Defendants' recognition that immunity can be waived; clearly Judge Roth accurately described current federal law.

Defendants suggest that this Court should nonetheless refuse to allow legislators to waive their privilege and voluntarily testify because doing so would somehow "dictate" the waiver by other legislators. *See* Defs. Mem. at 7. But the Third Circuit rejected precisely this kind of "pressure" argument in *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994), in which a congressman challenged a criminal indictment on Speech or Debate grounds, arguing that the charges would "force" him to introduce evidence of legislative acts in order to defend himself. Relying on *United States v. Brewster*, 408 U.S. 501 (1972), the Third Circuit ruled that the privilege offered no protection against that kind of "tactical pressure." *McDade*, 28 F.3d at 294. The privilege is to protect legislators from being "questioned," the Court wrote, "and a member is not 'questioned' when he or she chooses to offer rebuttal evidence of legislative acts." *Id.* The testimony of individual legislators no more waives the privilege of other legislators than the testimony of a criminal defendant waives the Fifth Amendment privilege of his or her co-defendants.

As the Court noted in *Powell* in terms that are apt here, "[a] proper invocation of legislative immunity would typically call for the dismissal of a legislator from the lawsuit." 247 F.3d at 525. Here, quite to the contrary, Ryan and Jubelirer have taken the lead in participating in the litigation. Having forsaken the core of their legislative immunity,

Defendants' efforts to pick and choose when immunity should be honored should be viewed skeptically. In this respect, the Motion in Limine should be understood as part and parcel of Defendants' strategy of attempting to win this case by excluding Plaintiffs' evidence rather than by offering any testimony actually supporting the legality of the Act 1 map.

II. TESTIMONY REGARDING MOTIVE AND LEGISLATIVE PROCESS IS PERMISSIBLE.

Evidence relating to legislative intent and the legislative process is clearly permitted under federal law. Indeed, to the extent that Plaintiffs' partisan gerrymandering claim remains in the case, as suggested by the Court's order denying the motion to dismiss as to claims arising under Article I,[2] the Supreme Court has made clear that such an inquiry would involve a showing of the "intended effect" of the election regulation at issue, *Cook v. Gralike*, 531 U.S. 510, 525 (2001), an inquiry that clearly would involve evidence of the legislative process used to enact the bill. *Cf. Davis v. Bandemer*, 478 U.S. 109, 116 n.5 (1986) (looking to partisan nature of legislative process when ruling on partisan gerrymandering claim under the Equal Protection Clause). With respect to the one-person, one-vote claim, to the extent that Defendants will present evidence to carry their burden of justifying Act 1's population deviations, *see Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (noting State's burden of proving that "the population deviations in its plans were necessary to achieve some legitimate state

2 Plaintiffs currently have pending a motion for clarification and/or reconsideration on this issue.

objective"), the relevance of this intent and process evidence is facially apparent; discussion regarding the justification of a statute is nearly meaningless without evidence of legislative intent and process. *See, e.g.*, *Easley v. Cromartie*, 121 S. Ct. 1452, 1464-65 (2001) (finding that email from map drawer to legislator offered "some support" for conclusion regarding legislature's intent); *Bush v. Vera*, 517 U.S. 952, 960-61 (1996) (crediting district court's finding of "substantial direct evidence of the legislature's . . . motivations," including "testimony of individual state officials"). Although the precise nature of the motive and process evidence that Plaintiffs would seek to present would depend in part on the justifications that Defendants offer for the deviations in population, to bar the use of all motive and process testimony would be improper.

Finally, Plaintiffs note that a redistricting statute is simply unlike a normal statute in which the Court can read the words and apply rules of interpretation to understand its intent and meaning. A redistricting statute like Act 1 more resembles a deed description than a statute; it is a series of legal descriptions that together form the boundaries of the districts; the infamous "Greenwood Gash" in the new 13th District is never identified as such, but rather appears only when the description of included townships, blocks, tracts of blocks, Districts, and Divisions of Wards are transformed into a map. Although the Court can reach certain understandings of intent simply by looking at the map and its irregularly drawn districts, additional

evidence of legislative intent will, plaintiffs believe, aid the Court in understanding the goal and effect of Act 1.

CONCLUSION

For the foregoing reasons, Defendants' Motion *in Limine* To Prohibit Testimony Concerning the Legislative Process or Motive should be denied.

Respectfully submitted,

REED SMITH LLP

By _____

Robert B. Hoffman
I.D. No. 23846
P.O. Box 11844
Harrisburg, PA 17108
(717) 257-3042

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

Attorneys for Plaintiffs Richard Vieth, Norma Jean Vieth, and Susan Furey

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THE COMMONWEALTH OF PENNSYLVANIA, et al
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No. 1: CV 01-2439
Judge Nygaard, Judge Rambo
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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2002, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record by fax transmission and first class mail, postage prepaid:

J. Bart DeLone
Senior Deputy Attorney General
Office of Attorney General
15th Floor
Strawberry Square
Harrisburg, PA 17120

Counsel for Hon. Mark Schweiker, Hon. Kim Pizzingrilli, Richard Filling, and the Commonwealth of Pennsylvania

John P. Krill, Jr.
Kirkpatrick and Lockhart LLP
240 N. Third St.
Harrisburg PA 17101-1507

Counsel for Hon. Robert Jubelirer and Hon. Matthew Ryan

REED SMITH LLP

By _____
Robert B. Hoffman
I.D. No. 23846
213 Market Street, Ninth Floor
P. O. Box 11844
Harrisburg, PA 17101
(717) 257-3042