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1-8-03

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.

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No. 1: CV 01-2439
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Yohn, Judge Nygaard

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY

Only one month before the Court's January 9, 2003 remedial hearing, the Pennsylvania General Assembly passed Act 2002-150 ("Act 150"), the legislature's fourth attempt to establish a valid congressional redistricting plan after the 2000 census. With Act 150, the General Assembly has sought to cure the population deviation in Act 34, the remedial redistricting plan enacted in response to this Court's April 8, 2002 decision. *See Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 678-79 (M.D. Pa.), *appeals dismissed*, 123 S.Ct. 67, 68 (2002). The General Assembly's power to correct the fatal flaw in Act 34, however, is not unlimited. Just as the legislature may not directly circumvent or overturn a final judicial decision, the Pennsylvania Constitution prevents the General Assembly from passing so-called "sneak" or "stealth" legislation. Section 6.2 of Act 150 falls squarely within that category of prohibited legislation, amending the precinct definitions in Act 34 through a covert, deceptive, and retroactive statutory provision. Act 150, therefore, is void as applied to Act 34, and therefore does not cure Act 34's unconstitutional 97-person deviation.

Apart from their reliance on Act 150, Defendants' Motion for Summary Judgment makes no new arguments in defense of Act 34. Accordingly, for the reasons stated below and in Plaintiffs' prior briefs, as well as in the brief filed today by Senator Mellow as *amicus curiae*, the Court should deny Defendants' Motion.[1]

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[1] Although styled as a summary judgment motion, Defendants' recent briefing falls well short of the standards set forth in Local Rule 56.1 for such motions. For example, many of the purported "facts" set forth in the Presiding Officers' Statement of Material Facts are simply

PROCEDURAL HISTORY

Plaintiffs brought this action challenging Act 1, Pennsylvania's original 2002 congressional redistricting statute, under a variety of constitutional theories. This Court dismissed some of Plaintiffs' claims in a February 22, 2002 order, but allowed the remaining claims to proceed to trial. *See Vieth v. Pennsylvania*, 188 F. Supp. 2d 532 (M.D. Pa.), *appeals dismissed*, 123 S.Ct. 67 (2002). Following a two-day trial, the Court struck down Act 1 as a violation of the one-person, one-vote guarantee of Article I of the U.S. Constitution. *See Vieth*, 195 F. Supp. 2d at 678-79. In its April 8, 2002 decision and order, the Court held that Act 1 contained an avoidable 19-person deviation that was not justified by reference to any legitimate state goal. *Id.* at 675-79. The Court retained jurisdiction to allow the General Assembly to pass a remedial plan and to assess the constitutionality of any such plan. *Id.* at 679.

On March 15, 2002, shortly before the Court struck down Act 1, the Armstrong County Court of Common Pleas (the "Armstrong County Court" or "County Court") issued an order altering the border between two election districts (commonly known as "precincts") in South Buffalo Township. *See In re Realignment of the Division Eastern and Western Precincts of the South Buffalo Township Election District*, No. 2002-0081-Misc. (Ct. Comm. Pleas Armstrong Cnty. Mar. 15, 2002) (attached at Tab L-2 to Defs.' Appendix to Stmt. of Material Facts). According to 2000 census figures, this precinct alteration moved 49 people

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disputed questions of law. *See* Plaintiffs' Response to Presiding Officers' Statement of Material Facts ¶¶ 25, 31, 38, 42, 43, 44, 45, 49, 50, and 51.

from the "South Buffalo District Western" precinct to the "South Buffalo District Eastern" precinct. *See* Pls.' Mot. to Impose Remedial Districts at 3 & Exh. C at ¶5 (filed Apr. 22, 2002).

Three weeks later, on April 18, 2002, Defendant Schweiker signed Act 34, the remedial redistricting plan enacted by the General Assembly on April 17. Act 34 substantially followed the political blueprint of Act 1, with minor adjustments. Under Act 34, "South Buffalo District Eastern" is a component of Congressional District 12 and "South Buffalo District Western" is a component of Congressional District 3. *See* 25 P.S. §3595.301(3), (12).

On April 22, 2002, Plaintiffs filed a Motion to Impose Remedial Districts, arguing that, in light of the Armstrong County Court's order, Act 34 contains a 97-person deviation between Districts 3 and 12. Pls.' Mot. to Impose Remedial Districts at 6-9 (filed Apr. 22, 2002). Plaintiffs also argued that Act 34 was an unconstitutional partisan gerrymander. *Id.* at 9-13.

On May 16, 2002, in apparent anticipation of this Court's constitutional review of Act 34, Defendant Schweiker signed Act 44, a statute passed by the General Assembly to cure Act 34's population deviation by seeking to retroactively rescind the authority of the Armstrong County Court to alter election districts. The parties subsequently submitted briefing, in the form of Status Reports, on the constitutionality of Act 34 (and the legal effect, if any, of Act 44). *See, e.g.*, Pls.' Response to Defs.' Status Report (filed June 18, 2002). On July 29, 2002, the Armstrong County Court denied a petition to vacate its March 15 order, confirming its original authority to issue its previous decision and determining that

Act 44 could not lawfully supersede an earlier, final judicial decision. *See In re Realignment of the Division Eastern and Western Precincts of the South Buffalo Township Election District*, No. 2002-0081-Misc. (Ct. Comm. Pleas Armstrong Cnty. July 29, 2002) (attached at Tab L-7 to Defs.' Appendix to Stmt. of Material Facts). No appeal was taken from the Armstrong County Court's July 29 order.

The parties then filed Second Status Reports in this Court addressing, *inter alia*, the constitutionality of Act 34, the effect of Act 44, and the finality of the Armstrong County Court's orders. *See, e.g.*, Pls. Response to Defs.' Second Status Reports (filed Sep. 9, 2002). In addition, the Defendants filed a Motion to Add the Armstrong County Board of Elections as a Necessary Party, which this Court denied on September 13, 2002. In the following weeks, the parties briefed various issues related to the Court's consideration of Act 34, including Defendants' Motion to Conduct Discovery (filed Sep. 17, 2002, denied Sep. 25, 2002) and Defendants' Motion to Present Evidence (filed Oct. 7, 2002, granted in part and denied in part Nov. 7, 2002). The Court's November 7 Order also scheduled a January 9, 2003 hearing on the constitutionality of Act 34.

On December 9, 2002, approximately six weeks before the end of his term, Governor Schweiker signed into law Act 150, which once again sought to cure the 97-person deviation in Act 34. Specifically, Section 6.2 of Act 150 adds a new Section 506 to Pennsylvania's election code, which states:

> In administering elections for the nomination and election of candidates for the United States House of Representatives and the General Assembly, county boards of election shall adhere to the following rule: Where an election district is used in or pursuant to a congressional redistricting statute or the final plan of the Legislative

> Reapportionment Commission to define the boundary of a congressional district or state legislative district, the boundary of such election district shall be the boundary existing and recognized by the Legislative Reapportionment Commission for the adoption of its final plan. The boundaries of the Congressional districts, as established by statute, and state legislative districts as set forth in the final plan of the Legislative Reapportionment Commission shall remain in full force and effect for use thereafter until the next reapportionment or redistricting as required by law and shall not be deemed to be affected by any action taken pursuant to this article.

2002 Pa. Legis. Serv. Act 2002-150, §6.2 (S.B. 824). Defendants filed their Motion for Summary Judgment eleven days later.

ARGUMENT

I. ACT 34 CONTAINS AN UNCONSTITUTIONAL POPULATION DEVIATION IN VIOLATION OF THE ONE-PERSON, ONE-VOTE RULE.

Defendants' recent Motion rehashes a number of arguments already addressed in numerous rounds of briefing in this Court. As Plaintiffs have previously demonstrated, Act 34 contains a population deviation over five times as large as the deviation invalidated in this Court's April 8, 2002 decision. *See Vieth*, 195 F. Supp. 2d at 678-79. Beyond their discussion of Act 150 – which, as Plaintiffs explain below, *infra* Part II, does not cure the unconstitutionality of Act 34 – Defendants offer nothing new in their defense of Act 34.

As Plaintiffs have explained,[2] the General Assembly's purported legislative "intent" to use outdated precinct boundaries in Act 34 cannot alter the plain language of the statute, including the unambiguous precinct definitions as they

[2] *See* Pls.' Response to Defs.' Mot. to Offer Evidence at 1-8 (filed Oct. 17, 2002); Pls.' Response to Defs.' Second Status Reports at 5-7 (filed Sep. 9, 2002); Pls. Response to Defs.' Status Report at 5-8 (filed June 18, 2002); Pls.' Mot. to Impose Remedial Districts at 6-9 (filed Apr. 22, 2002).

existed at the time. Nor does Act 34's incorporation of the changes made by the Armstrong County Court's valid, final order[3] interfere in any way with the authority of the General Assembly to control redistricting under Article I, Section 4 of the U.S. Constitution. Because the alteration of the election precinct boundaries in Armstrong County occurred *before* passage of Act 34, the County Court's decision had no effect on the General Assembly's constitutional power to draw congressional district boundaries.[4]

In addition, Defendants have offered nothing new that would permit, let alone require, this Court to second-guess the final decision of the Armstrong County Court on purely state-law grounds.[5] As Plaintiffs have explained,[6]

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[3] Because it "dispose[d] of all claims and of all parties," the Armstrong County Court order was a "final order." *See* Pa. R.A.P. 341(b). When no appeal was taken by April 15, 2002, the March 15, 2002 order became a final judgment. *See id.* Rule 903(a). Whether Defendants in this case were actual parties in the Armstrong County Court action is irrelevant to the finality of the order and judgment in that case. Moreover, even assuming *arguendo* that Defendants had no notice of the initial petition, they had ample opportunity to seek intervention prior to Armstrong County Court's July 29, 2002 denial of the Board's petition to vacate the March 15 order. They chose instead simply to urge the Armstrong County Board of Elections to file that petition.

[4] It would be an entirely different matter if state courts attempted to change congressional district boundaries *after* the enactment of a congressional redistricting plan. In such situations, any precinct alteration would not affect congressional boundaries *previously established* by a legislature (or an appropriate court). For this reason, prior to the passage of Act 34 there was no need to alert this Court to the Armstrong County Court's order. Defendants' contrary suggestion (*see* Supplemental Memo in Support of Summary Judgment of Presiding Officers at 1-2 (filed Jan. 3, 2003)) has no merit. Under Plaintiffs' consistent view of the law, *see, e.g.*, Pls.' Response to Defs.' Mot. to Offer Evidence at 10 & n.6 (filed Oct. 17, 2002); Pls.' Response to Defs.' Mot. to Add Necessary Party at 2 & n.1 (filed Sep. 9, 2002); Pls.' Response to Defs.' Second Status Reports at 7-8 & n.5 (filed Sep. 9, 2002), the Armstrong County Court's order had no effect on Act 1 or the Court's consideration of it. The significance of the County Court's order became clear only after the General Assembly passed Act 34, choosing to employ the then-existing precinct definitions to describe new congressional districts. At that point, Plaintiffs promptly notified this Court of the resulting population deviation in Act 34.

[5] Defendants have vacillated on this issue. Previously, they did not ask the Court to address that issue. *See, e.g.*, Presiding Officers' Second Status Report at 6 (Defendants "do not ask this Court to assess whether the county court wrongly applied the standard set forth in 25 P.S. § 2702" because, in their view at that time, "[f]or this Court to determine the relevance of the Armstrong County situation . . . does not require it to determine that the state court's action was

fundamental jurisdictional and federalism principles would bar any attempt to have this Court overturn a final state court decision, *see, e.g., District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("a United States District Court has no authority to review final judgments of a state court in judicial proceedings"), particularly where, as here, the state court decision involved only state law issues.[7] *Cf. Lee v. Kemma*, 122 S. Ct. 877, 885 (2002) (Supreme Court may not review state court decisions resting on independent and adequate state-law grounds). In any event, even if the Court were to examine the merits of the Armstrong County Court's decision, there simply is no basis under state law or otherwise to overturn the decision.[8]

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incorrect or void"). Now, they once again suggest that the purported state-law error in the Armstrong County Court's order affects the outcome of this case. *See* Presiding Officers' Mem. in Support of Sum. J. at 9-10.

[6] Pls.' Response to Defs.' Second Status Reports at 2-3 & n.1 (filed Sep. 9, 2002); Pls. Response to Defs.' Status Report at 3-5 (filed June 18, 2002).

[7] The two cases cited by Defendants, Presiding Officers' Mem. in Support at 9, are wholly inapposite. Those cases addressed the proper weight given to prior state court precedent from entirely separate, unrelated judicial proceedings. *See Sallada v. Nationwide Mutual Ins. Co.*, 95 F. Supp. 2d 250, 253-55 (M.D. Pa. 2000) (weighing competing state and federal court precedent); *Continental Ins. Co. v. McKain*, 821 F. Supp. 1084, 1087 (E.D. Pa. 1993) (determining that "Pennsylvania courts provide little guidance on the issue that is the subject of this motion"), *aff'd*, 19 F.3d 642 (1994). By contrast, Defendants here ask this Court to reverse or nullify, on state-law grounds, a directly related state court order. The Armstrong County Court did not merely opine on the meaning of Pennsylvania law; it also moved a precinct boundary pursuant to its statutory authority.

[8] As the Armstrong County Court explained in its final decision rejecting the retroactive application of Act 44 (the Act that sought to reverse the county court's earlier order), Act 44's addition of "alter in any manner" to the Pennsylvania Election Code's list of prohibited actions, 2002 Pa. Legis. Serv. Act 2002-44 (S.B. 1240), simply confirms that the prior statute did not contain that limitation, i.e., it empowered the county court to alter precinct boundaries. *See In re Realignment of the Division Eastern and Western Precincts of the South Buffalo Township Election District*, No. 2002-0081-Misc., at 6-7 (Ct. Comm. Pleas Armstrong Cnty. July 29, 2002) (attached at Tab L-7 to Defs.' Appendix to Stmt. of Material Facts) ("[T]he legislature's amendatory language . . . clearly evinces the notion that alteration of existing boundaries was not included in the terms 'establish, abolish, divide, or consolidate' as used in the previous version of § 536 of the Election Code.").

Finally, Presiding Officer Defendants once again engage in a futile attempt to justify Act 34's population deviation under the one-person, one-vote test set forth in *Karcher v. Daggett*, 462 U.S. 725, 734 (1983). *See* Presiding Officers' Mem. in Support of Sum. J. at 12-15. However, the Defendants cannot relitigate the "good faith" prong of the *Karcher* test, which is satisfied once a plaintiff shows that a plan's population deviation was avoidable.[9] And, as Plaintiffs have indicated,[10] the Defendants' supposed "justification" for the deviation in Act 34 – that the General Assembly had to keep the deviations in Act 34 to place the Northpointe Industrial Park entirely within Congressman Murtha's Twelfth District – directly conflicts with Defendants' claims that the legislature both was unaware of the precinct shift and intended to pass a zero-deviation map. In any event, Defendants cannot possibly demonstrate, as required by *Karcher*,[11] that a population deviation was *necessary* to avoid splitting the industrial park into two congressional districts.[12]

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[9] *See Vieth*, 195 F. Supp. 2d at 676 ("[the population deviation in Act 1, even though relatively small, enables the Plaintiffs to satisfy *Karcher*'s first prong and shifts to the Defendants the burden of proving justification.").

[10] Pls.' Response to Defs.' Mot. to Offer Evidence at 10-13 (filed Oct. 17, 2002); Pls.' Response to Defs.' Second Status Reports at 7-8 (filed Sep. 9, 2002); Pls.' Mot. to Impose Remedial Districts at 6-9 (filed Apr. 22, 2002).

[11] *See Vieth*, 195 F. Supp. 2d at 677 (defendants must prove that a map's population deviation "was 'necessary to achieve some legitimate goal'") (quoting *Karcher*, 462 U.S. at 731)

[12] As the Court has held, relying on trial testimony from all parties and on the submission into evidence of Plaintiffs' "Alternative Plan 4," it is undoubtedly possible to pass a redistricting map in Pennsylvania with zero population deviation and no split election precincts. *See Vieth*, 195 F. Supp. 2d at 676-77. As that same Alternative Plan 4 indicates, it is possible to draw a zero-deviation congressional map that keeps Northpointe in only one congressional district (in the case of Alternative Plan 4, *all* of Armstrong County, including Northpointe, was placed in Congressman Murtha's Twelfth District, *see* Pls.' Trial Exh. 13).

II. ACT 150 IS VOID BECAUSE ITS ENACTMENT VIOLATED THE PENNSYLVANIA CONSTITUTION.

The only new issue raised in Defendants' Motion concerns the effect, if any, of Act 150 on the constitutionality of Act 34. Act 150, if it were validly enacted and interpreted as Defendants suggest, would eliminate any one-person, one-vote concerns raised by Act 34. But in its second attempt to solve the Act 34 problem and its fourth overall attempt to create a constitutionally sound redistricting plan, the General Assembly has again failed.

Act 150 can only be understood as an amendment to Act 34. Prior to Act 150, Act 34 meant one thing and after Act 150, Act 34 meant something else. The Pennsylvania Constitution, however, imposes clear restrictions on the ways that laws of the Commonwealth can be amended. Specifically, the Pennsylvania Constitution, Art. III, §6 provides: "No law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length." Pa. Const. art. III, § 6.

The purpose and effect of this constitutional provision are well-established. As the Pennsylvania Supreme Court has explained, the Framers of the 1874 Constitution designed Article III, Section 6 "to provide full notice and publicity to all proposed legislative enactments, and thus to prevent the passage of 'sneak' legislation." *L.J.W. Realty Corp. v. Philadelphia*, 134 A.2d 878, 882 (Pa. 1957); *accord Harristown Dev. Corp. v. Commonwealth*, 614 A.2d 1128, 1134 n.12 (Pa. 1992). A "sneak" bill is one whose "'purpose, meaning, and full scope'" are not

"clearly apparent on its face." *L.J.W. Realty*, 134 A.2d at 882 (citation omitted); *see Young v. Fetterolf*, 182 A. 676, 681-82 (Pa. 1936) (explaining that an act "is a new law complete in itself" and hence outside the coverage of Article III, Section 6 only if its "meaning is apparent on its face" and it "does not require the re-enforcement of any other statute to give it effect"). By barring sneak legislation, Article III, Section 6 "enable[s] both the legislators themselves and all persons interested in the legislation to see exactly the changes made between the existing law and the re-enactment, without the necessity of referring to the former for comparison." *Hallberg*, 97 A.2d at 851 (citations omitted).

To satisfy Article III, Section 6, the Pennsylvania Constitution imposes on the Commonwealth's legislature a simple, but critically important duty: when a statute or a subsection thereof is being amended, it must be re-printed in full so that everyone – legislators and the public alike – knows its operative effect on existing law before it is passed. Section 6.2 of Act 150 wholly violates that provision and thus is null and void.

There can be no argument that Section 6.2 of Act 150 complies with this constitutional requirement. The section makes no mention of Act 34 or any subsection thereof and clearly did not reenact or publish at length the section amended – the paragraphs of the Congressional Redistricting Act of 2002 (Act 34) that define the geographic scope of the Commonwealth's Third and Twelfth Congressional Districts, 25 P.S. § 3595.301(3), (12). Nor can there be any doubt that this is an amendment. If Act 34 meant one thing before Act 150 was passed and another thing after it was passed, then Act 150 "amended" Act 34, within the

meaning of Article III, Section 6, regardless of whether it expressly mentioned Act 34 or obscured its relation with Act 34. *See* Pa. Const., Art. III, §6 ("No law shall be . . . *amended* . . . by reference to its title only, but so much thereof as is . . . amended . . . shall be re-enacted and published at length." (emphasis added)); *see also United States v. Adams*, 759 F.2d 1099, 1110 (3d Cir. 1985) (a legal instrument is "amended" when its terms are "altered, either literally *or in effect*" (emphasis added)). The fact that Act 150 does not refer to Act 34 even by title, much less by reenacting and publishing at length the amended paragraphs, only exacerbates the constitutional violation here. *See Appeal of Barrett*, 10 A. 36, 37 (Pa. 1887) (invalidating an amendatory act that "utterly ignore[d]" the requirements of Article III, §6).

While the legislature easily could have fixed the problem, this is no mere technical error. Article III, §6 exists in order to ensure open, deliberative, and accountable government.[13] That goal was completely frustrated here. Two seemingly technical and innocuous sentences about the boundaries of election districts were thrown at virtually the last minute into the middle of a 41-page omnibus election-reform bill, where few if any could readily grasp their potential impact on the future of Pennsylvania's representation in Congress. The available legislative history reflects that no one in the General Assembly explained publicly that §6.2 could affect congressional representation, the validity of Act 34, or the

[13] Like many state constitutions, the Pennsylvania Constitution has several provisions designed to provide the public an opportunity to know what the legislature is doing and to comment in time to affect pending legislation. *See* Art. III, §1 (prohibiting amendment of bills to change their purpose); Art. III, §3 (prohibiting passage of bills with more than one subject, except for specified exceptions); and Art. III, §4 (requiring bills to be considered on three separate days).

course of the constitutional litigation before this Court. That silence speaks volumes, however, about the true purpose of §6.2 and demonstrates that it falls squarely "within the mischief of blind, ignorant, misleading, or deceptive legislation [that Article III, §6] was intended to prevent." *In re Greenfield Ave.*, 43 A. 225, 226 (Pa. 1899).

It would not have been at all burdensome for the General Assembly to comply with Article III, §6. The relevant paragraphs of Pennsylvania's Congressional Redistricting Act (Act 34) that the Legislature sought to amend provide: "The Third District is composed of [a long list of places, including the] part of Armstrong County consisting of the Township[] of . . . South Buffalo District Western . . . ," and "The Twelfth District is composed of [another long list of places, including the] . . . part of Armstrong County consisting of the Township[] of . . . South Buffalo District Eastern . . . ." 25 P.S. § 3595.301(3), (12). As Plaintiffs' earlier briefs explain in detail, Act 34's references to "South Buffalo District Western" and "South Buffalo District Eastern" refer to those election districts as they existed at the time the legislation passed the General Assembly – after the Armstrong County court had altered their boundaries. As enacted in April 2002, Act 34 "cured" the 19-person deviation in Act 1 by establishing a remedial map with a population deviation more than five times as large, in clear violation of Article I of the Federal Constitution.

If the General Assembly wanted to cure this constitutional violation, all it had to do was reenact and publish at length the two amended paragraphs describing the Third and Twelfth Districts. *See Elias v. Board of Sch. Directors of*

Windber Area, 218 A.2d 738, 740 (Pa. 1966) ("If the purpose of an act is to amend a subsection, it is sufficient to re-enact and publish at length only that subsection.") (citing *Commonwealth v. Hallberg*, 97 A.2d 849, 851 (Pa. 1953)). But, because such a straightforward and honest approach to legislating was not consistent with their aims, the majority in the General Assembly chose not to do so. That choice – to sneak through amendatory legislation while ignoring the state Constitution's clear command – violated Article III, §6.

Act 150 also cannot be saved by the argument that it is merely an interpretive direction, rather than a substantive amendment to Act 34. The Pennsylvania Supreme Court, citing longstanding precedents, has reaffirmed that the General Assembly "may not direct a statute to be construed in a certain way." *Commonwealth v. Sutley*, 378 A.2d 780, 784 (Pa. 1977) (citing Article III, §6 cases).

The seminal case cited by the Pennsylvania Supreme Court was *Titusville Iron-Works v. Keystone Oil Co.*, 15 A. 917 (Pa. 1888). *Titusville Iron-Works* hinged on the constitutionality of an 1887 act that purported to change the judicial construction of acts passed in 1836 and 1845. The earlier acts gave certain classes of mechanics and "material-men" the right to place liens on buildings for work done or material furnished. In 1887, the legislature wanted to confer similar rights on other classes of mechanics, laborers, and material-men who were not covered by the earlier statutes, as consistently interpreted by the Pennsylvania courts. Rather than passing a new act extending the right to a lien to the new classes of workers, the legislature directed the courts to construe the 1836 and 1845 acts to

include the new classes within their provisions, claiming that this construction comported with the "true intent and meaning" of the 1836 and 1845 acts. *Id.* at 917. The 1887 act did not reenact any of the provisions of the earlier acts, nor did it publish at length the provisions as amended. The Pennsylvania Supreme Court unanimously invalidated the 1887 act and stated that "[i]t would be difficult to imagine a plainer violation" of Article III, §6 which, the court explained, "requires all statutes to be self-explanatory and complete in their provisions; and forbids the . . . amendment . . . of previous legislation [by any method] short of a re-enactment at length." *Id.* at 919. The court concluded that it "cannot, no matter how much inclined we might be to do so, give effect, even as to future cases, to expository acts like that under consideration" and, accordingly, voided the 1887 Act, leaving the Commonwealth's "system of liens for the benefit of mechanics and material-men . . . as it was before the act of 1887 was passed." *Id.*[14] The violation of Article III, §6 here is no less plain: Section 6.2 of Act 150 is neither self-explanatory nor complete in its provisions, and its attempt to mandate that Act 34 be construed contrary to its plain text likewise should be held invalid and void.

Under longstanding Pennsylvania precedents, any amendment enacted in violation of Article III, §6 is null and void, leaving the earlier statute fully intact and unamended. *See, e.g., Titusville Iron-Works*, 15 A. at 919.[15] Indeed, the

[14] The *Titusville Iron-Works* court also invalidated the 1887 act as an unauthorized exercise of judicial power, in violation of Article V, Section 1, which vests the Commonwealth's judicial power in the courts.

[15] The Pennsylvania Supreme Court has stated unequivocally that the limitation on the Legislature's power set forth in Article III, §6 is judicially enforceable. *See Sweeney v. Tucker*, 375 A.2d 698, 708-09 & n.24 (Pa. 1977).

Pennsylvania Supreme Court has repeatedly invalidated laws on precisely this basis. *See, e.g., Hallberg*, 97 A.2d at 852; *Upper Merion Township v. Borough of Bridgeport*, 149 A. 490, 491-92 (Pa. 1930); *Commonwealth v. Wayne Sewerage Co.*, 134 A. 390, 390-91 (Pa. 1926); *Burgess of Borough of Norristown v. Citizens' Passenger Ry. Co.*, 23 A. 1062, 1062 (Pa. 1892); *Titusville Iron-Works*, 15 A. at 918-19; *Appeal of Barrett*, 10 A. 36, 37 (Pa. 1887). Courts in other States with similar or identical constitutional provisions have done likewise. *See, e.g., American Lung Ass'n v. Wilson*, 59 Cal. Rptr. 2d 428, 431-33 (Cal. App. 1996); *Presley v. Mississippi State Highway Comm'n*, 608 So. 2d 1288, 1296-98 (Miss. 1992); *Sims v. Union Underwear Co.*, 551 So. 2d 1078, 1079 (Ala. Civ. App. 1989); *Flanders v. Morris*, 558 P.2d 769, 773-74 (Wash. 1977); *State ex rel. McNary v. Stussie*, 518 S.W.2d 630, 631-38 (Mo. 1974); *Rider v. State*, 200 S.W. 275, 275-76 (Ark. 1918).

If the General Assembly had been willing to amend Act 34 in the conventional and constitutionally permissible manner, all one-person, one-vote concerns would by now be history. It simply did not do so.

III. ACT 34 IS AN UNCONSTITUTIONAL PARTISAN GERRYMANDER.

As Plaintiffs have previously explained, Act 34 is unconstitutional for several additional reasons beyond the one-person, one-vote rule.

First, as discussed in Plaintiffs' recent Pre-Hearing Memorandum (filed Dec. 19, 2002), Plaintiffs wish to preserve for appeal their partisan gerrymandering claim previously dismissed by this Court in its February 22, 2002 Order. An earlier appeal of that dismissal was mooted because the General Assembly repealed the relevant districting plan, Act 1, and replaced it with Act 34 for all purposes subsequent to the 2002 election. Act 34, in turn, is virtually identical to Act 1 in terms of its partisan impacts. Thus, in order to preserve the partisan gerrymandering issue, Plaintiffs ask the Court to consider and rule on the question whether Act 34 should be rejected as a remedy because it is an unconstitutional partisan gerrymander. In so requesting, Plaintiffs recognize that our arguments are much the same as those raised and rejected as to Act 1 last year. But we would ask the Court to consider not only those previous legal arguments but also the factual record developed at trial and the Court's own findings about the purposes and effects of Act 1 (findings that would be equally applicable to Act 34), *see, Vieth*, 195 F. Supp. 2d at 678-79.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion for Summary Judgment and declare that Act 34 fails to remedy the constitutional violation.

Respectfully submitted,

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Dated: January 7, 2002

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

RICHARD VIETH, NORMA JEAN VIETH et al Plaintiffs,	:	
v.	:	No. 1: CV 01-2439 Judge Nygaard, Judge Rambo Judge Yohn
THE COMMONWEALTH OF PENNSYLVANIA, et al Defendants.	:	

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2003, 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:

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