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

FILED
HARRISBURG
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MARY E. D'ANDREA, CLERK
Per RB
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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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR STAY, PENDING APPEAL, OF ORDER GRANTING DECLARATORY JUDGMENT AND INJUNCTION AND FOR EXPEDITED CONSIDERATION[1]

On April 12, this Court denied Defendants' motion requesting a stay of its order enjoining the Defendants from operating the 2002 elections under an unconstitutional congressional districting plan. Defendants now renew that motion, when the only factor that they introduce as justifying the reconsideration eviscerates their argument: The General Assembly has passed, and the Governor has signed, a new set of districts that they assert cure the constitutional violation. If this Court were to agree that the new map is a valid remedy, then there is every reason to put the new plan into

1 Plaintiffs are simultaneously filing a Motion To Impose Remedial Districts And, In The Alternative To Reject Act 34 And Begin Remedial Hearings. As requested by the Court, Argument I of that Motion discusses Footnote 2 of Defendants' Renewed Motion for a Stay.

effect for the 2002 elections. If this Court were to disagree, there is even less reason for a stay, because the voters of Pennsylvania have a right to expect to be able to participate in elections conducted using the remedial map this Court would ultimately mandate.

ARGUMENT

None of the factors relevant to a stay request weighs in favor of granting the Defendants' motion. There is absolutely no likelihood that Defendants will prevail on the merits before the Supreme Court; they show no irreparable injury from running an election under valid constitutional districts; granting their motion will deny the constitutional rights of nearly half of Pennsylvania's residents; and the public interest does not favor a stay. *See Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653 (3d Cir. 1991).

I. DEFENDANTS ARE NOT LIKELY TO SUCCEED ON THE MERITS

This Court's decision was a fact-based decision that applied existing Supreme Court precedent in a straightforward manner. Defendants have done nothing to show that this Court will be reversed.

First, this was an entirely straightforward application of precedent, addressing no new legal questions and making no new law. The Court merely followed the Supreme Court's command that courts uphold voters' right to equal representation in congressional elections "with precision," as required by Article I, section 2. Slip op. 4; *see Karcher v. Daggett*, 462 U.S.

725, 734 (1983) ("[T]here are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, § 2 without justification."); *id.* at 730 ("Art. I, § 2 . . . permits only the limited population variations which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown.") (internal quotation marks and citation omitted); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969) ("[T]he 'as nearly as practicable' standard requires that the State make a good-faith effort to achieve precise mathematical equality. . . . Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.") (citation omitted).

The judgment ultimately rested on two critical findings of fact that, contrary to Defendants' protests, are supported by substantial record evidence. Under these circumstances, it is particularly unlikely that five Justices of the Supreme Court would vote to reverse a trial court "that was closer to the facts." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers).

First, the Court's finding that Act 1's population deviations were avoidable was well supported by the alternative maps submitted by both parties that contained the minimum possible deviation of one person. The Court's finding that Defendants did not make a good-faith effort to minimize population deviations was based on the testimony of their own witness, Dr. John Memmi, who stated that Applicants' map-drawers were told to stop

attempting to minimize population deviations once they had reached a 19-person deviation. Plainly, making *some* effort to reduce population deviation and "rejecting alternatives that would have increased the deviation," Presiding Officers' Mem. at 6, is not the same thing as making the "good-faith effort to achieve *precise mathematical equality*" that the Constitution requires. *Kirkpatrick*, 394 U.S. at 530 (emphasis added).

Second, there was ample evidence to support the determination that Defendants' only proffered justification for Act 1's population deviations – the desire to avoid splitting more precincts than necessary – was "a mere pretext." Slip op. 8. The testimony of Bob Priest, as well as Dr. John Memmi, could only have led to the conclusion that "[i]f Defendants truly wanted to avoid splitting precincts, they would have done so by enacting a zero deviation map that did not split *any* precincts." Slip op. 9. The evidence showed not only the disingenuousness of Defendants' "precinct split" justification, but also that Act 1's numerous precinct splits were unconnected to population equality or any other neutral justification. Rather, Act 1 jettisoned every one of the neutral legislative policies that the *Karcher* Court stated could justify an avoidable population deviation. None of the justifications that Defendants offer explains the deviations, for the alternative plans that Plaintiffs introduced fared as well or better on every criterion *and still* achieved the minimum population deviation. All such goals could have been achieved without deviating from equal population.

Any argument Defendants might make as to the adequacy of the remedial period the court granted them is undermined by the fact that the General Assembly has presented – and the Governor has signed – new legislation, just ten days after the District Court issued its order. There is nothing in this Court's decision that makes it remotely likely that it will be reversed.

II. DEFENDANTS WILL SUFFER NO IRREPARABLE HARM ABSENT A STAY

Defendants point to no irreparable harm that they will suffer absent a stay. The General Assembly has now passed legislation that it will propose as remedying the constitutional violation. If this Court finds that the modified Act 1 satisfies the relevant requirements, that act will govern the 2002 congressional elections. If not, some other map will have to be selected. Either way, the remedial map should go into effect this year.

That the Commonwealth may decide to alter the primary date does not create irreparable harm. To the contrary, it shows that whatever harm may have existed was in the final analysis completely reparable. The Commonwealth still has a number of options in determining how to proceed, from postponing the primary election to holding a second primary for congressional elections, or even holding the primary as scheduled with a compressed administrative calendar preceding it. Defendants assert that they have decided on a strategy contingent on the outcome of this litigation. So despite their descriptions of the intractable bind that the Court's order has

forced upon them, their arguments reveal that the General Assembly has sufficient time and options to handle the situation and settle on the best course for the voters. There is no need for this Court to remedy what the Applicants can remedy themselves.[2]

It is worth noting that not only is the solution within the Defendants' power, but the problem is completely of their own making. Defendants have adopted a strategy of "victory by delay" in which they have sought to slow the redistricting process and the subsequent litigation at every turn. Act 1 languished in the General Assembly for more than six weeks after legislation on the issue was first introduced on November 16, 2001. And in litigation in both state and federal court, Defendants have opposed every attempt to ensure that litigation over Act 1 would finish in time for the election to proceed on its original schedule, insisting time after time that "[t]here are no exigent circumstances or 'inherent time constraints' compelling this Court to act on the instant complaint." *See, e.g.*, Memorandum of Law for Defendants Lieutenant Governor Jubelirer and Speaker Ryan ("Presiding Officers") in Support of Their Motion to Abstain, at 5 (Jan. 25, 2002). Whatever inconveniences the Court's order may present could easily have been avoided if Defendants had cooperated in seeking, instead of opposing,

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[2] Indeed, the only reason that a new election schedule is not already in place is the General Assembly's attempt at brinksmanship. Although the Assembly considered proposals to modify the election calendar, Act 34 contains no such provisions. Instead, the General Assembly bet that this Court (or the U.S. Supreme Court) would grant a stay of its decision, allowing the unconstitutional Act 1 to be used in the November elections. To now argue that this is a reason for a stay ignores that this is a problem the General Assembly purposely created.

an expedited resolution of this matter. Having taken the actions that resulted in the order being issued when it was (and having taken the steps as well that led to the finding of unconstitutionality), Applicants can hardly be heard to complain about the result. There is no reason for the Court to invoke its emergency powers to prevent a harm that Applicants themselves created.

III. ANY INJURY DEFENDANTS MIGHT SUFFER IS GREATLY OUTWEIGHED BY THE IRREPARABLE INJURY A STAY WOULD CAUSE TO PLAINTIFFS

In contrast, granting a stay would force Plaintiffs, along with the 5,817,384 other residents of Pennsylvania's overpopulated districts, to suffer irreparable harm. While denying a stay will ensure that the residents of Pennsylvania will elect representatives under a constitutionally valid plan – passed by the legislature or constructed by the federal court – granting a stay pending appeal would for all practical purposes reverse this panel's decision and impose the unconstitutional Act 1 on Pennsylvania citizens for the 2002 elections. A full election cycle would thus take place using a congressional districting plan that has been found to violate the rights of almost half of Pennsylvania's population. The denial of Plaintiffs' constitutional right to an undiluted vote, even for one election, is irreparable.

Granting a stay here would thus violate constitutional rights while furthering no legitimate goal that Defendants cannot achieve with a plan that meets constitutional requirements. Not only is the harm irreparable, it will serve no legitimate state interest. The balance weighs clearly against a stay.

IV. THE PUBLIC INTEREST WEIGHS HEAVILY AGAINST A STAY

Finally, the public interest weighs heavily against the issuance of a stay in this matter. Defendants speak of voter and candidate confusion caused by running elections under a new plan. However, there are no such real harms. Voter confusion will now be greater if the Court *grants* a stay. As Defendants themselves admit, a stay will mean that voters will go to the polls under different congressional districts for the 2000, 2002, and then 2004 elections. Denying a stay will allow voters to experience only one change in districts. Further, neither granting nor denying a stay will eliminate candidate confusion. At this point, all serious candidates will have recognized and prepared for the serious likelihood that their current campaign will be disrupted by this litigation. Nothing the Court does now can undo that.[3]

The public interest lies in enforcing constitutional rights. Article I guarantees to "the People of the several States" a House of Representatives in which they are represented directly and equally. U.S. Const. art. I, § 2. Act 1 deprives Pennsylvania's voters of direct and equal representation in two respects: It intentionally evades Article I's mandate that "as nearly as is practicable one man's vote in a congressional election is to be worth as

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[3] Defendants continue to argue that because the 19-person deviation is small, the justification would need only have been slight, as well. But Defendants showed *no* justification, so the population deviation, though slight, was for absolutely *no* legitimate state goal. Moreover, the harm of a slight deviation can be equal to the harm created by districts with *larger* deviations that have greater – though still not sufficient – justification. The harm here is that the deviation was for *no* reason; the harm where there is greater deviation is that the deviation was for *an insufficient* reason.

much as another's," *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), and does so for the sole purpose of preserving lines drawn to dilute the voting strength of a majority of Pennsylvania's voters.

If the 2002 elections were allowed to proceed under this unconstitutional redistricting plan, Defendants would achieve precisely the goal they desired when they intentionally jettisoned the Constitution's "one-person, one-vote" mandate in favor of maximizing their partisan advantage. Under Act 1, long-term Democratic incumbents (*e.g.*, Representatives Mascara, Hoeffel, Borski, and Holden) and other Democrats may well be unseated in the 2002 elections, even though those incumbents would have had a fair opportunity for reelection under a fair redistricting plan that satisfied constitutional requirements. As a result, even a later redrawing of the district lines likely would not eliminate the long-term effects of the initial unconstitutional districting plan. See *Erfer v. Pennsylvania*, No. 14 M.M. 2002, ¶ 46 (Pa. Commw. Ct. Feb. 8, 2002) (finding that election under Act 1 would result in Republican success beyond the current election). Applicants would thus succeed in their goal of minimizing Democratic representation in Congress for a two-year congressional term – and, given the importance of seniority in the committee structure of the House of Representatives, likely for much longer. A stay would amount to an outright reversal of this Court ruling.

To allow elections to proceed under Act 1 in this election would also send a clear message to other state legislatures that they need not conform to

constitutional requirements in their efforts to maximize partisan advantage in redistricting, because any constitutional defect will be corrected long after they have reaped the gains of their defiance of Article I. The public has a strong interest in the preservation of the right to direct and equal representation in *every* congressional election, not just in the elections that legislators believe do not matter. Consideration of the public interest counsels against the issuance of a stay.

CONCLUSION

For the foregoing reasons, the motion for a stay should be denied.

Respectfully submitted,

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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 April 22, 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:

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