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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 Nygaard, Judge Rambo, Judge Yohn

PLAINTIFFS' POST-TRIAL BRIEF

Defendants' redistricting map violates Pennsylvania voters' constitutionally guaranteed right to an equal vote in congressional elections. At trial, Defendants offered no valid explanation for their violation of the Constitution's one-person, one-vote mandate because they could not. As the record amply demonstrates, not only were the population variances in Act 1 easily avoidable, but Defendants' failure to eliminate them resulted from one cause only: their unwillingness to allow even minor modifications of a draft map carefully designed to maximize Republican partisan advantage. Such a "justification" is constitutionally insufficient. It follows, given the timing of the 2002 election process, that the appropriate remedy in this case is for this Court to enjoin the conduct of any elections under the Defendants'

unconstitutional districting plan and to order into effect a remedial map for the 2002 elections that reflects traditional, nonpartisan districting criteria.

I. THIS COURT SHOULD INVALIDATE ACT 1 AS AN UNJUSTIFIABLE VIOLATION OF THE ONE-PERSON, ONE-VOTE RULE.

As explained in Plaintiffs' Trial Brief, the inquiry under *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983), requires two steps. First, Plaintiffs must show that Act 1 contains avoidable deviations from equal population. Second, in order to defend their map, Defendants must prove that those deviations were necessary in order to adhere to some specific, legitimate, nondiscriminatory, and consistently applied districting criterion.

It is undisputed that Act 1 creates congressional districts with a 19-person population deviation. The evidence clearly shows that this population deviation was avoidable. Plaintiffs presented Alternative Plan 4, which has the minimum possible deviation – districts that differ in population by only one person. Pl. Exh. 4; Pl. Exh. 21. Alternative Plan 4 achieves this minimal population deviation without splitting any election precincts, while Act 1 splits six precincts. Pl. Exh. 12, at 7; Tr. at 13:13-16, 30:1-2 (Priest); 126:2-5 (Lichtman). Alternative Plan 4 also splits fewer municipalities than Act 1, is more compact, and does not unnecessarily pair any incumbents. Exh. 12, at 5, 7; Tr. at 116:21-117:8, 124:3-16, 125:15-126:1 (Lichtman).

This evidence readily satisfies the first prong of the *Karcher* test. *Nerch v. Mitchell*, No. 3:CV-92-0095, at 27, 31 (M.D. Pa. Aug. 13, 1992)

(the presentation of alternate maps with lower deviations is "credible evidence that the overall deviations in the plan proffered by the state could be reduced," and thus shifts the burden to the defendants to justify the deviations); *accord Stone v. Hechler*, 782 F. Supp. 1116, 1125 (N.D. W. Va. 1992); *Anne Arundel County Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 395 (D. Md. 1991).

In contrast, Defendants utterly failed to sustain their burden under the second prong of *Karcher*. It appears that they intend to argue, based on the testimony of Dr. John Memmi, that the Act 1 population deviations were not reduced to the minimum amount because Defendants did not want to split more than the six precincts that were split, during the New Year's Eve meeting of the Republican map-drawing team, as part of the process of reducing population deviations to 19. But that justification simply does not withstand analysis, as Dr. Memmi's own testimony disclosed.

To begin with, it is undisputed on this record that any map can be "zeroed out" without splitting any precincts through a process of swapping whole precincts (*e.g.*, moving precincts along the boundaries of a Congressional District from one district to another).[1] Robert Priest described his technique of generating thousands of "swapping" options and testified that this technique could be applied to any map. Tr. at 30:9-31:8

1 Because whole precincts are moved in this technique, there are by definition no precinct splits. In contrast, the alternative process of moving census blocks, discussed subsequently in the text, necessarily produces precinct splits because a census block is part of a precinct.

(Priest). Dr. Memmi did not disagree. Tr. at 321:5-322:25, 326:19-327:2, 328:10-18 (Memmi).

In fact, Dr. Memmi made clear that he and the other technician members of his map-drawing team started using precisely such a precinct-swapping technique and successfully got three districts to the ideal population without any precinct splits. Rather than continuing to apply that approach to the remaining 16 districts, they stopped (with the deviation at 1,134) and turned to achieve further reductions in population deviation only by moving individual census blocks and thereby splitting precincts. Tr. at 321:5-322:6 (Memmi). The reason the technicians did so was simple: their political superiors directed them to do so. Tr. at 321:5-322:25 (Memmi). In turn, it is clear that the political superiors issued that order so as to preserve the basic political geography and political advantage created by the map and out of a concern that moving precincts might alter that advantage.

Then, when the deviation had been reduced to 19, the technicians were told to stop making further changes. Tr. at 320:2-17 (Memmi). They did so even though none of the districts containing split precincts was yet at the ideal population. Tr. at 322:24-323:14 (Memmi).

In sum, the evidence shows that the Defendants were so wedded to their draft map that they (1) allowed only very limited use of precinct swaps, and (2) prematurely terminated the movement of census blocks. The politically-imposed limitation on the swap of whole precincts is precisely what necessitated the precinct splits that, ironically, Defendants now use to

justify the remaining population deviations. Likewise, when Dr. Memmi, at the request of Defendants' counsel, did proceed to "zero out" Act 1, he was again told to do so only via the movement of census blocks -- which necessarily creates split precincts -- rather than by swapping whole precincts. Tr. at 324:8-325:14 (Memmi). Thus, any contention that the Act 1 map can be equalized only by an increase in precinct splits is undermined by the recognition that the precinct splits result from the constricting methodology imposed on the map technicians.

The result of Dr. Memmi's attempt to zero out the Act 1 map neither demonstrates that split precincts were an inevitable consequence of reducing population deviations nor supports avoiding further splits as justification for the existing Act 1 deviations. The plain fact is that the Defendants have never tried, either during the drafting of Act 1 or in the context of litigation, to reduce the deviations to zero using whole precincts, because that would have entailed slightly more substantial changes in the district lines they initially drew and might alter the partisan geography the defendants so dearly wanted.

Defendants' purported "precinct split" justification could suffice only if it were combined with some additional evidence seeking to justify the particular district configuration and meandering borders in Act 1 and thus seeking to justify Defendants' refusal to allow the swaps of intact precincts that would have somewhat altered that configuration as they eliminated the deviations. But Defendants never offered any such evidence. They refused

to call any witness to testify as to (1) what legitimate considerations led them to draw Act 1 the way they did, and (2) why it would unduly sacrifice some such legitimate consideration to zero out Act 1 using precinct swaps. The reason, of course, is that the only principle followed by Defendants in drawing the lines was achieving partisan advantage, and the reason they were so insistent on avoiding any changes in their map was that it was so carefully calibrated to achieve that single-minded goal.

Plaintiffs' partisan bias evidence confirmed this result. As Dr. Allan Lichtman testified, Defendants accomplished their objective by employing two methods. First, Defendants' map packed Democratic voters into certain districts, thereby ensuring that a substantial percentage of Democratic votes would be wasted in those districts, and fractured other geographic concentrations of Democratic voters in order to minimize their voting strength. Tr. at 91:2-92:4 (Lichtman). Although on average, in 19 statewide elections from 1991 to 2000, 50 percent of Pennsylvanians voted for Democratic candidates, Dr. Lichtman, isolating the effect of reapportionment, found that Act 1 would produce 14 congressional districts that favor Republican candidates and only 5 congressional districts that favor Democratic candidates. Pl. Exh. 12, at 1; Tr. at 96:1-10 (Lichtman). The result is that with 50% of the vote, Act 1 gives Republicans a majority in 74% of Pennsylvania's congressional seats, creating an extreme partisan bias of 24%. Pl. Exh. 12, at 1; Tr. at 96:11-17 (Lichtman).

Second, Defendants took other steps designed to harm as many Democratic incumbents as possible, while protecting Republican incumbents. Although Pennsylvania's loss of two congressional seats following the 2000 census requires the pairing of only two sets of incumbents in the 2002 election, Defendants pitted *six* incumbents against one another: two pairs of Democrats, and one Republican and one Democrat (the latter in a district that heavily favors Republican candidates). Pl. Exh. 12, at 1; Tr. at 112:25-114:9 (Lichtman). Moreover, in order to eliminate an additional Democratic incumbent, Rep. Mascara, Defendants drew a district (the 8th Congressional District) that both reduced the Democratic vote percentage in his district by 7.6% points and eliminated his voting base; concomitantly, Defendants replaced that base with the entirety of the state Senate district currently represented by Republican Tim Murphy, who, quite predictably, has announced that he will run for Congress in the new district. Pl. Exh. 2D; Pl. Exh. 12, at 1; Tr. at 44:5-1 (Priest); Tr. at 203:23-205:20 (Ceisler). As Rep. Mascara testified, it is so unlikely that he would win reelection in his new district that he has decided to run in an entirely different district, voluntarily pitting himself against a 15-term incumbent Democrat. Tr. at 260:11-24, 261:14-25 (Mascara).

Finally, having created an unnecessary pairing of incumbent Representatives, Defendants were able to create an open seat in a district (the 6th Congressional District) that was drawn to favor Republican candidates. As with Senator Murphy , the new 6th Congressional District

contains the bulk of the state Senate district currently represented by Republican Jim Gerlach. Senator Gerlach, again predictably, has announced that he will run for Congress in the new district. Pl. Exh. 2C; Pl. Exh. 12, at 1; Tr. at 31:25-32:16 (Priest); Tr. at 214:18-215:25 (Ceisler).

Testimony by Dr. Thomas Brunell, expert witness for the defendants, did not remotely contradict Dr. Lichtman's findings that Act 1 packed and fractured Democrats and undermined Democratic incumbents while protecting Republicans. Tr. at 37-38, 46 (Brunell). Defendants' expert only questioned Dr. Lichtman's finding of a 24% partisan bias, without, however, noting any flaws in Dr. Lichtman's data or presenting data or estimates of his own. He admitted that the results of statewide elections showed the Republicans carrying 14 of 19 districts with 50 percent of the vote, Tr. at 39-41 (Brunell), and that he had done a similar analysis of partisan bias in the Texas congressional case last year, Tr. at 41-46 (Brunell). He attempted, unsuccessfully, to pick at the edges of Dr. Lichtman's testimony, but studiously avoided doing any analysis of his own that would either show his criticisms made any difference or produce a different estimate of political bias in the redistricting plan.

Defendants offered no evidence of the reasons that guided their drawing of the districts under Act 1 precisely because they recognized that the bald desire to maximize partisan advantage is not the type of "legitimate," "nondiscriminatory," "consistently applied" state objective that might justify the population deviations in their plan. *See Karcher*, 462 U.S.

at 740 (defendants bear the burden of proving that population deviations were "necessary to achieve some legitimate state objective"); *accord Nerch*, No. 3:CV-92-0095, at 27. The Supreme Court has identified such possible justifications as including "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Karcher*, 462 U.S. at 740. As the evidence at trial showed, Defendants' plan accomplishes none of these legitimate objectives. In fact, in order to maintain their desired level of extreme partisan bias, Defendants disregarded each and every one of these traditional, neutral districting principles. As Plaintiffs' witnesses testified, Defendants' map creates noncompact, irregularly shaped districts; it splits 84 local governments, including 25 counties and 65 cities, boroughs, and townships; it fundamentally alters the character of Democratic incumbents' districts, dividing communities with common interests; and, as noted above, it protects only Republican incumbents, and creates unnecessary contests between incumbents that favor Republicans in every case. Pl. Exh. 12, at 5, 7; Tr. at 112:25-114:9, 124:3-16, 125:15-126:1 (Lichtman); Tr. at 202:6-12, 215:11-25, 218:4-16 (Ceisler); Tr. at 252:21-253:5, 254:11-16, 271:16-25 (Mascara).[2]

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2 Although Defendants offered no trial evidence to justfy the deviations in Act 1 other than the policy of creating additional precinct splits while preserving the basic contours of their map, they nonetheless may attempt to argue in their brief that Act 1 grew out of a variety of "legitimate" concerns, including, for example, population shifts in Pennsylvania, Voting Rights Act compliance in Philadelphia, etc. Even assuming that evidence of this kind can be introduced through the quasi-testimony of counsel in post-hearing briefing, rather than through a proper witness who can be cross-examined under oath, this tactic cannot possibly save Act 1. To meet their burden under *Karcher*,

Defendants may attempt to justify their refusal to alter the basic contours of their map – and instead excise as few as three people at a time from the precincts in which they live – on the grounds that only a map that achieved partisan advantage for the Republicans would be likely to pass the Republican-controlled General Assembly. This explanation is plainly insufficient. As the Supreme Court has made amply clear, "the political realities of 'legislative interplay'" can never be used to justify a population deviation – or, indeed, any constitutional violation. *Kirkpatrick*, 394 U.S. at 530; *id.* at 533 ("Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.").

Defendants may also attempt to justify the Act 1 deviations as furthering the goal of protecting incumbents. For the reasons stated above, that explanation also fails. As experts Ceisler and Lichtman testified, Act 1 may protect all Republican incumbents, but it aims to eliminate four of nine Democratic incumbents, or nearly half of Pennsylvania's Democratic congressional delegation, by unnecessarily pairing incumbents and redrawing their districts to heavily favor Republican candidates. Tr. at 248:19-249:10 (Ceisler); Tr. at 112:25-114:9 (Lichtman). Defendants' failure to protect Democratic incumbents on an equal basis demonstrates that incumbency protection is not a "nondiscriminatory," "consistently applied"

Defendants must show that each deviation in Act 1 was necessitated by the consistent application of legitimate, neutral state policy. Simply asserting that a variety of state goals played a role in the map-drawing process is a far cry from proving that those state goals required the precise boundaries and deviations in Act 1.

legislative objective that might constitute a justification for population deviation under *Karcher*. Protecting only Republican incumbents is not a legitimate basis to maintain population deviations.

Because Act 1 deviates from the one-person, one-vote mandate with no legitimate justification, it must be struck down as unconstitutional.

II. THIS COURT SHOULD ORDER INTO EFFECT A REMEDIAL MAP THAT REFLECTS TRADITIONAL, NONPARTISAN REDISTRICTING PRINCIPLES.

Once a congressional redistricting plan has been found unconstitutional, a federal court has broad discretion to fashion an appropriate remedy. That remedy must balance the goals of ensuring the legality and fairness of the 2002 election process and ensuring that the elections proceed in a timely manner.

First, because Act 1 denies Pennsylvania voters the equality in voting strength guaranteed by Article I, section 2, this Court should enjoin Defendants from conducting any elections under the Act 1 plan. *See Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment has been found to be unconstitutional, it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.").

Second, this Court should ensure that the elections proceed on schedule, consistent with the strong federal interest in the timely and orderly

conduct of elections, by setting forth a plan for conducting the 2002 election.[3] Given this late date in the 2002 election process, there is little likelihood that the General Assembly would be able to create a new, constitutional plan in time to allow for the normal electoral processes leading up to the May 21, 2002 primary. The only way to ensure that the elections proceed on schedule is for this Court to set forth a remedial map itself. *See, e.g.*, *Connor v. Finch*, 431 U.S. 407, 422-25 (1977) (noting that when a plan is not in place, with "elections . . . on the horizon," the district court would have to draw one).

This Court's remedial districting plan must conform to traditional nonpartisan districting principles, such as those described in *Karcher*, 462 U.S. at 740: compactness, respect for the boundaries of local governments, preservation of the cores of prior districts, and avoidance of contests between incumbent Representatives. *See Daggett v. Kimmelman,* 580 F. Supp. 1259, 1261-62 (D.N.J. 1984), *aff'd*, 467 U.S. 1222 (1984). In choosing among possible remedial maps, this Court need not select the plan that most resembles Act 1, if that plan would also violate traditional redistricting principles and reflect an intent to discriminate against one political party. *See id.* at 1262. The policy of securing partisan advantage deserves no deference in a court's selection of an appropriate remedial map. *See id.* at 1263.

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[3] Hewing to the primary election schedule is certainly the preferable course, but if developing an appropriate remedy makes that infeasible, the Court has the authority to alter the primary election date. Plaintiffs see no present need for the Court to do so.

Alternative Plan 4, presented by Plaintiffs, satisfies traditional redistricting values in addition to complying with the one-person, one-vote rule. It creates more compact districts, contains no split precincts, preserves the cores of prior districts, and avoids unnecessary contests between incumbent Representatives. This Court should therefore set forth Plaintiffs' Alternative Plan 4 as the map to be used to conduct the 2002 election.[4] The remedial map chosen by this Court should remain in place for subsequent elections unless and until the Pennsylvania General Assembly enacts a new, lawful plan. This Court should retain jurisdiction to evaluate the constitutionality of any such plan passed by the General Assembly.

Third, because the adoption of a remedial map will, by necessity, change the boundaries of Pennsylvania's congressional districts, this Court should extend the deadline for the filing of nomination petitions to allow candidates to collect signatures from electors in the districts created by the remedial map. *See Upham v. Seamon*, 456 U.S. 37, 44 (1982) (federal

4 Even if this Court is inclined to adopt a remedy based directly on Act 1 – which it should not, given Act 1's clear defects – the Court should not adopt Defendants' modified Act 1, which contains 26 split precincts. Def. Exh. 90. As Defendants' and Plaintiffs' concur, split precincts pose a variety of problems, including voter confusion, and logistical difficulties and expense for election officials. Tr. at 272:8-275:5 (Mascara); Tr. at 345:1-353:25 (Marion). In addition, they destroy the confidentiality of the franchise for those individuals who have been excised from their precincts and placed in a different congressional district – a problem that Defendants' map-maker did not consider when creating Defendant's modified Act 1. Tr. at 332:4-9 (Memmi). Given Defendants reliance on avoiding precinct splits to justify their actions, it would again be ironic were the Court to adopt a plan that increases those splits. Rather than accept Defendants' modified Act 1 map, the Court should give Plaintiffs the opportunity to submit a proposed remedial map that is based on Act 1 but does not split precincts or split as many municipalities.

courts have the authority to move filing deadlines); *see also Vera v. Bush*, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996) (same). The filing deadline for nomination petitions was March 12, 2002, which was also the last day of trial in this case. Because candidates and potential candidates have not yet had an opportunity to circulate nomination petitions and gather signatures from electors in the districts that would be set forth by this Court, this Court must extend the filing period to allow candidates to file nomination petitions in accordance with Pennsylvania law.

CONCLUSION

For the foregoing reasons, this Court should immediately declare Act 1 unconstitutional, enjoin future elections from proceeding under Act 1, order into effect congressional districts that conform to constitutional requirements and reflect traditional, nonpartisan redistricting principles, and extend the filing deadline for nomination petitions in order to allow candidates to circulate petitions in the new districts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 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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