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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.	)	**No. 1: CV 01-2439**
	)	**Judge Rambo, Judge**
THE COMMONWEALTH OF PENNSYLVANIA; MARK S. SCHWEIKER, et al.,	)	**Yohn, Judge Nygaard**
Defendants.	)	

PLAINTIFFS' RESPONSE TO DEFENDANTS' SECOND STATUS REPORTS REGARDING ACT 34'S POPULATION DEVIATION

Defendants continue to offer a number of confusing assertions in their effort to explain why this Court should accept as an adequate constitutional remedy a new statute that *increased* the population disparities that caused this Court to hold the previous congressional redistricting statute unconstitutional. Plaintiffs will attempt below to summarize and organize the legal issues that are now before the Court, and then explain why none of defendants' contentions justifies acceptance of Act 34 as a remedy.

I. The Issues Now Before the Court

As the Court is aware, the Armstrong County Court of Common Pleas entered an order – prior to the enactment of Act 34 – that altered the boundaries of two precincts. As plaintiffs have noted previously, local reporting indicated the altered boundaries were to further favor a sitting Member of Congress who was

greatly benefited by Act 1, as well as Act 34. The Armstrong County Court has now had an opportunity to reconsider its decision, and it has let that decision stand.

This Court has already declared Act 1 to be unconstitutional because it contained a population deviation that was not justified. The only issue before this Court is whether Act 34 is unconstitutional. There is no dispute that Act 34 defines the congressional districts in Pennsylvania solely by reference to precinct boundaries. There is no dispute that, at the time Act 34 was enacted, the Armstrong County Court's revision of the precinct boundaries were in effect. There is also no dispute that Act 34, assuming it incorporates by reference those current precinct boundaries, has a population deviation between the largest and smallest district increases to 97. Because defendants have not seriously attempted to justify that disparity as necessary to achieve some legitimate legislative objective, the only real question concerning the validity of Act 34 as a constitutional remedy is whether, in fact, that Act incorporated the current precinct boundaries, including those altered by the Armstrong County Court.

As to that issue, defendants no longer ask this Court to hold that the Armstrong County Court lacked the authority under state law to alter the precincts involved here.[1] They "do not ask this Court to assess whether the County Court

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[1] The new-found reticence is wise. As the Armstrong County court explained in its order denying the Elections Board's motion to vacate, Pennsylvania law clearly did authorize the precinct boundary alteration at the time it was ordered. More importantly, fundamental jurisdictional and federalism principles would bar any attempt to have this Court second-guess a final decision of a state court, *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 judgements of a state court in judicial proceedings"), particularly where, as here, the state court decision

wrongly applied the standard set forth in 25 P.S. § 2702," because, in their current view, "[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 incorrect or void." Presiding Officers' Second Status Report at 6. *See also id.* at 3 ("While Presiding Officers believe the action of the Board of Elections of Armstrong County in seeking a boundary change in February 2002 was prohibited by statute, that state issue does not have to be decided for this Court to resolve this litigation.").[2]

Instead of relying on supposed state-law limitations on the authority of the Armstrong County court, defendants now argue that Act 34 itself should be read as incorporating some prior version of the precincts at issue, rather than the precincts as they existed under state law at the time of the enactment of Act 34. They further argue that such a reading is required under Article I, section 4 of the U.S. Constitution. Finally, they argue that even if Act 34 is validly read as increasing the population disparity in Act 1, it should still somehow be accepted as a remedy

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involved only state law issues. *Cf. Lee v. Kemna*, 122 S.Ct. 884, 885 (2002) (Supreme Court may not review state court decisions resting on independent and adequate state law grounds); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875). Not surprisingly, defendants have cited no case – either in the *Rooker/Feldman* context or any other – permitting a federal court to review a final state court judgment for compliance with *state* law.

[2] Although the Executive Officers assert that "the Armstrong County matter has not as yet been resolved," Executive Officers' Second Status Report at 2, they do not explain why. In contrast, the Presiding Officers concede that "the time for appeal [of the Armstrong County Court's decision] has run and none was taken." Presiding Officers' Second Status Report at 3.

for the constitutional violation this Court found. None of these arguments holds any water, as we show below.

We note first, however, that the defendants have recently moved to add as a party the Armstrong County Board of Elections. They argue that the Board is a necessary party, required in order for this Court to grant full relief in this case, regardless of whether it accepts or rejects Act 34. Clearly, that motion should be decided *before* the Court proceeds to address the merits of the remedy issue – if only to allow the Armstrong County Board the opportunity to file briefs regarding the remedies to which defendants believe it should be bound as a party.

Moreover, the Court may also want to wait to take any action until the Supreme Court has issued initial rulings in the pending appeals in which plaintiffs are appealing the dismissal of their partisan gerrymandering claim and defendants are appealing the Court's post-trial injunction invalidating Act 1 as unconstitutional on one-person, one-vote grounds. *See* S.Ct. Case Nos. 01-1817 (Docketed June 14, 2002); 01-1823 (Docketed June 14, 2002); 01-1873 (Docketed June 26, 2002); 02-135 (Docketed July 29, 2002). If the Supreme Court were to "note probable jurisdiction" over either appeal (each of which is set to be considered at the Court's September 30, 2002 Conference), there might well be good reason to stay further remedial proceedings in this Court pending a merits decision by the Supreme Court next spring.

II. Act 34 Can Only Be Read as Referencing and Incorporating the Armstrong County Precincts as they Existed on the Date of Enactment.

Defendants never claim that the actual language of Act 34 in any way supports the notion that the Act refers to election precincts as they existed at some time prior to the enactment of the Act. Nor could they. The Act merely states that "South Buffalo District Western" is a component of Congressional District 3 and "South Buffalo District Eastern" is a component of Congressional District 12. As a matter of law, such a designation can only sensibly be read as referring to the two districts (or precincts) in South Buffalo Township as then currently established under state law.[3] Two provisions of Pennsylvania's Statutory Construction Act compel that conclusion. First, words and phrases are to be accorded their common and approved usage. *See* 1 Pa.C.S.A §1903*; Orson, Inc. v. Miramax Film Corp.*, 79 F.2d 1358 (3d Cir. 1996). References to "South Buffalo District Western" and South Buffalo District Eastern" can only mean those precincts as they exist in the real world of Armstrong County. Second, when the words of a statute are clear and free from ambiguity, the "letter of it is not to be disregard under the pretext of pursuing its spirit." 1 Pa.C.S.A. §1921(b); *In re Barschak*, 106 F.3d 501 (3d Cir. 1997).[4]

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[3] As plaintiffs have explained, even if defendants had urged this Court to look beyond the plain language of Act 34 to infer some purported "intent" of the legislature – notably, a position defendants never have taken – that argument would directly contradict defendants' consistent position throughout this litigation that courts may not inquire into the motive or intent of the General Assembly. *See* Plaintiffs' June 28, 2002 Response to Defendants' Status Report at 6-7 & n.4.

[4] A third statutory construction principle applies by analogy. Under 1 Pa.C.S.A. §1937(a), a reference in a statute to a statute or regulation includes the statute or

Instead of relying on the statutory language, defendants engage in a sleight of hand, arguing that plaintiffs are seeking to rely on something other than the 2000 Census Data in analyzing population deviations in Act 34. *See* Presiding Officers' Second Status Report at 7-8. But that is not the case at all. As defendants note, the Pennsylvania Legislative Data Processing Center set forth a list of populations for existing units of geography in the Commonwealth, using the 2000 Census results. These data, which reflected the locations of every Census block and tract as of 2000, were then used by all parties in the redistricting process. When the Armstrong County court altered the boundaries over the election precincts in South Buffalo Township, moving four census blocks from one precinct to the other, it changed the populations in each precinct. Thus, plaintiffs are not using different census data. They are merely applying the data from the Legislative Data Processing Center to reflect the new array of census blocks in each precinct.

To do otherwise would be to depart from the results of the 2000 Census, not to rely on them. Thus, it is defendants who are doing precisely what they accuse plaintiffs of doing. They are seeking leave to *ignore* the precincts into which the 2000 census figures were divided when the Legislature enacted Act 34. Defendants provide no authority for the Court to do that.

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regulation with all subsequent amendments unless the specific language or context of the reference is clearly to the contrary. Thus, the presumption is that statutes adopt up-to-date materials, not those that have been superseded.

III. Nothing in the U.S. Constitution Precludes a Natural Reading of Act 34.

Presiding Officers suggest that incorporation of the Armstrong County Court's decision into Act 34 intrudes on the General Assembly's congressional redistricting power under Article I, Section 4 of U.S. Constitution. This is a red herring that, once again, ignores the simple chronology of events in the redistricting process.

Because the alteration of the election precinct boundaries in Armstrong County occurred *before* passage of Act 34, the County Court's decision had absolutely no bearing on the General Assembly's constitutional authority to draw the congressional district boundaries in that Act. Had the General Assembly wished to exercise that authority by enacting a map using something other than the then-existing precinct definitions, it was certainly free to do so. Trusting the General Assembly to have understood the *pre-existing* legal definitions of boundaries and geographic subdivisions it chose to include in a redistricting enactment is hardly a "usurpation" by this Court of the Legislature's constitutional authority.

V. If Act 34 Is Read as Increasing the Population Deviation in the Prior Map, It Cannot Serve as a Valid Constitutional Remedy.

Defendants half-heartedly argue that even if Act 34 increases the population deviation to 97 persons, the Court should accept it as a constitutionally valid remedy. This argument is absurd. As this Court has held, a population deviation, however small, must be justified by reference to some legitimate legislative policy that it serves. *See Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 676 (M.D. Pa. 2002) (citing *Karcher v. Daggett*, 462 U.S. 725, 734 (1983)). Here, defendants

make no such effort. They argue instead that the General Assembly "believed the Act 34 plan represented the closest to a zero deviation plan possible." Presiding Officers' Second Status Report at 8. There is no basis for that statement. But, more importantly, a mistaken belief about the effects of the legal description in the Act cannot constitute a justification. Defendants then note that Act 34 "split no populated voting precincts." *Id.* But noting that fact is far from offering a justification. Defendants make no showing that the creation of a 97-person deviation resulted from the effort to avoid precinct splits. To the contrary, the record reflects – and this Court has found – that it is possible to have a zero deviation while splitting no precincts of any kind.[5] *See Vieth v. Pennsylvania*, 195 F. Supp. 2d at 677.

V. The Court Should Set a Schedule, If Needed, for Briefing to Ultimately Decide Whether Act 34 Is Unconstitutional.

As the Court is aware, plaintiffs believe that Act 34 is clearly unconstitutional. In the event that the Court requires further briefing on the issues in this case, plaintiffs recommend that the Court set a schedule for briefing and/or a hearing to commence after the Court has determined whether the Armstrong County Board of Elections will participate in this case and after the Supreme Court

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[5] The Presiding Officers conclude their Second Status Report with a section arguing that if the Court rejects Act 34 as a remedy, it will need to address the "Armstrong County situation" in some further way in the remedial phase in order to prevent additional precinct changes that might call into question the constitutionality of any future remedial plan. As we argue in Plaintiffs' Response to the Motion to Add Necessary Party, that is not true at all. All that is required is that a congressional district plan make clear what the new lines are. Once it does so, that act by itself will prevent any future changes in precincts boundaries that coincide with district boundaries.

of the United States has determined whether it will note probable jurisdiction on the parties' appeals. Such a schedule would maximize the use of judicial resources without any threat that these issues will not be resolved prior to the 2004 elections.

CONCLUSION

For the foregoing reasons, the Court should declare that Act 34 fails to remedy the constitutional violation.

Respectfully submitted,

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Dated: September 9, 2002

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FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be served by first class mail, postage prepaid September 9, 2002, as follows:

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