ORIGINAL

(217)
10-17-0

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

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO OFFER EVIDENCE AT HEARING

INTRODUCTION

As this Court recognized in its September 25, 2002 Order, the constitutionality of Act 34 turns on "a purely legal issue." The operative facts relevant to that issue are undisputed, notwithstanding the defendants' repeated efforts to cloud the issue with irrelevant factual assertions. Defendants concede that if the precinct lines established by the Armstrong County Court are read into Act 34, that congressional redistricting statute contains a population deviation that is over four times greater than the deviation previously invalidated by this Court. To forestall that conclusion, the defendants ask the Court to consider evidence purportedly demonstrating the General Assembly's intent to create a zero deviation map in Act 34. The legislature's supposed intent, however, is irrelevant where, as

here, the statute is clear and unambiguous on its face. Well-settled rules applicable to the construction of Pennsylvania statutes forbid courts from looking beyond a statute's unambiguous words to effectuate some purported underlying legislative purpose or to correct a perceived drafting error.

As explained below, the General Assembly was under no obligation to employ the geographic definitions it included in Act 34. Having done so, defendants' counsel cannot transform an otherwise clear statute to suit defendants' present wishes and avoid the constitutional consequences of the legislature's actions. Nor can defendants expect to save Act 34 with last-minute justifications that not are only unsupported by the record, but directly contradict the defendants' earlier assertions and the undisputed evidence already before this Court. For these reasons, the Court should deny the defendants leave to present their proffered evidence and proceed to assess the constitutionality of Act 34 as written.

ARGUMENT

I. ACT 34 UNAMBIGUOUSLY ESTABLISHES CONGRESSIONAL DISTRICTS WITH A POPULATION DEVIATION.

A. Act 34 Unambiguously Defines Congressional Districts.

Act 34 plainly and unambiguously defines the new 3rd and 12th congressional districts as the sum of various distinct geographic subdivisions. Among other things, Act 34 provides that "[t]he Third [Congressional] District is composed of part of Armstrong County consisting of . . . South Buffalo District Western ...." 25 Pa. Const. Stat. §3595.301(3). Similarly, Act 34 provides that "[t]he Twelfth [Congressional] District is composed of . . . part of Armstrong

County, consisting of . . . South Buffalo District Eastern. ...." *Id.*, §3595.301(12). At the time of the statute's enactment, the precincts listed in Act 34 were clearly defined by state law, including the binding, final decision of the Armstrong County Court of Common Pleas.

In arguing that Act 34 is a zero deviation plan, defendants offer up a virtual armamentarium of construction principles in an effort to have "South Buffalo District Western" and "South Buffalo District Eastern" mean something other than the footprints they have in the real-world soil of Armstrong County. In fact, each of those construction principles is inapposite, and the basic governing principle is one defendants studiously avoid: "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. Cons. Stat. §1921(b); *see also, e.g.*, *Ramich v. Worker's Comp. Appeal Bd. (Schatz Elec., Inc.)*, 770 A.2d 318, 322 (Pa. 2001); *Nationwide Mut. Ins. Co. v. Wickett*, 763 A.2d 813, 818 (Pa. 2000); *Armco, Inc. v. Workmen's Comp. Appeal Bd. (Mattern)*, 667 A.2d 710, 715 (Pa. 1995); *Markle v. Workmen's Comp. Appeal Bd. (Caterpillar Tractor Co.)*, 661 A.2d 1355, 1360 (Pa. 1995). Under Pennsylvania law,[1] "[o]nly when the language of the statute is ambiguous does statutory construction become necessary." *Ramich*, 770 A.2d at 322 (citing 1 Pa. Cons. Stat. §1921(c); *Oberneder v. Link*, 696 A.2d 148, 150 (Pa. 1997).

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[1] It is clear, as defendants concede, that "Federal courts are to look to a state's rules of statutory construction in interpreting its statutes." Schweiker Defs' Joinder in Presiding Officers' Mot. to Offer Evidence, at 5 (citing *Figuerao v. Buccaneer Hotel, Inc.*, 188 F.3d 172, 179 n.6 (3d Cir. 1999); *United States v. Parise*, 159 F.3d 790, 799 (3d Cir. 1998); *A.J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 334 (3d Cir. 1986)).

The Third Circuit discussed and applied that principle in reversing a district court's interpretation of a Pennsylvania statute in *In re Barshak*, 106 F.3d 501 (3d Cir. 1997), reasoning that the lower court's interpretation conflicted with the statute's plain language:

> In reaching our result we acknowledge that a reasonable argument can be made that the outcome in the district court is consistent with the general policy reflected in section 8124 to exempt retirement funds from attachment and execution. Furthermore, it plausibly could be argued that that outcome does not frustrate subsection B's limitation on the exemption, since the $71,134.75 was accumulated in yearly increments of less than $15,000. But even if this policy argument were well-founded, a point on which we express no opinion, the plain language of subsection B compels us to reach our result. We are not free to ignore the clear language of a Pennsylvania statute merely because by rewriting the statute we arguably would act consistently with a legislative policy. 1 Pa. Cons. Stat. Ann. § 1921(b) (1995). *In the end, the case comes down to this: we rule on the basis of what the law is rather than what a party wishes it could be.*

Id. at 506 (emphasis added).

A statute is not ambiguous whenever counsel contend that two meanings are possible or where, as here, counsel believe the statute's words do not reflect the legislature's intent. Rather, a statute is ambiguous only when, without resort to the rules of construction, the language of the statute "will bear two or more meanings." *City of Philadelphia v. Schaller*, 25 A.2d 406, 409 (Pa. Super. 1942). Defendants offer no reasonable construction of the words in Act 34 to demonstrate an ambiguity. Instead, they turn the purpose of the statutory construction principles on their head, attempting to use them to *create* an ambiguity rather than to *resolve*

one. *But see In Re Kritz' Estate*, 127 A.2d 720, 723 (Pa. 1956) (statutory construction "not to be used to create doubt, but only to remove it").

In this respect, defendants grasp at nearly every statutory construction principle available in Pennsylvania to determine legislative intent, including virtually all of the criteria in 1 Pa. Cons. Stat. §1921(c)(1-8) and all of the presumptions in §1922(1-5). But they neglect to note that §1921(c) authorizes the use of these criteria *only* "[w]hen the words of the statute are not explicit." The presumptions that §1922(1-5) establish for use in ascertaining legislative intent likewise require a threshold determination of statutory ambiguity – a determination that simply cannot be made for Act 34.[2]

In sum, "South Buffalo District Western" and "South Buffalo District Eastern" mean in Act 34 what they mean in the real world of Armstrong County: areas with established metes and bounds and voters. Defendants' effort to argue to the contrary violates the very construction principles they would use to reach a different result.

B. Defendants' Purported "Intent" and "Knowledge Evidence Is Irrelevant.

Because Act 34 is unambiguous, any evidence supposedly demonstrating the General Assembly's "intent" or "knowledge" is irrelevant to this Court's consideration of Act 34.[3] It is irrelevant, therefore, whether any individual

[2] For example, it may be a presumption that the Legislature does not intend to violate the Constitution (1 Pa. Cons. Stat. §1922(3)), but that presumption is a proper aid only in choosing between reasonable alternative meanings of a statute, not in creating an ambiguity where no exists in the statutory language.

[3] In addition, as plaintiffs have explained, the defendants' reliance on evidence indicating some purported "intent" of the legislature directly contradicts defendants' consistent (until recently) position throughout this litigation that courts may not inquire into the motive or intent of the General Assembly. *See*

legislator stated a desire to use outdated precinct definitions in Act 34. *See* Presiding Officers' Mem. in Supp't of Mot. to Offer Evidence at 8 & n.6 (relying on legislators' statements). Regardless of any legislator's purported intent, Act 34 itself includes no modification of the then-existing precincts.

At the time of Act 34's passage, the General Assembly certainly was empowered to ignore the state's precinct definitions entirely, to make clear that it wished to use the precinct definitions as they existed prior to the Armstrong County Court's decision, or to define the new congressional districts in any way it deemed proper. In fact, nothing now prevents the General Assembly from passing prospective legislation to effectuate some of its members' claimed intent.

Indeed, the General Assembly already has made one such attempt in passing Act 44, which purported to eliminate retroactively the Armstrong County Court's authority to alter precinct lines. *See* Act 2002-44 2002, May 16, P.L. 310, No. 44.[4] Act 44 amended Pennsylvania's Election Code in two ways: (1) by retroactively expanding the statutory prohibition on precinct changes to cover the type of alteration ordered by the Armstrong County Court, and (2) by extending the so-called "precinct freeze" period (the elections period during which precincts may not be altered). *Id.* Although, as the Armstrong County Court concluded, Act 44

Plaintiffs' June 28, 2002 Response to Defendants' Status Report at 6-7 & n.4. Moreover, "[r]eliance on legislative debate in interpreting the intent or meaning of a statute is contrary to Pennsylvania law, *see Commonwealth v. Alcoa Properties, Inc.*, 440 Pa. 42, 269 A.2d 748 (1970), and therefore the remarks of individual legislators cannot be binding as to legislative intent." *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n,* 837 F.2d 600, 616 (3d Cir. 1988) (citing *Hoffman v. Pennsylvania Crime Victim's Comp. Bd.*, 46 Pa. Commw. 54, 405 A.2d 1110 (1979)). See also *Elder v. Orluck*, 515 A.2d 517, 521-22 (Pa. 1986); *Zemprelli v. Thornburgh*, 407 A.2d 102, 109 (Pa. Commw. 1979).

[4] Act 44 is described in the Armstrong County Court decision at 2-8, attached to Presiding Officers' Second Status Report.

could not, as a matter of law, retroactively invalidate that court's March 15, 2002 order redefining the South Buffalo precincts, nothing impedes the General Assembly's present ability to pass redistricting legislation reflecting its supposed intent. Any evidence seeking to elucidate that intent as of the time of Act 34's enactment, however, cannot alter the terms of an otherwise clear statute.

For similar reasons, it is irrelevant whether, in passing Act 34, the General Assembly relied on population data assigned by the Legislative Data Processing Center ("LDP") to then-outdated precinct boundaries. *See* Presiding Officers' Mem. in Supp't of Mot. to Offer Evidence at 3-6 & n.4 (relying on General Assembly's use of LDP data applicable to earlier precinct definitions); Schweiker Defs' Joinder in Presiding Officers' Mot. to Offer Evidence at 5 (same). LDP derived those data by applying official 2000 Census data to Pennsylvania's then-existing geographic boundaries. When the geographic boundaries changed *prior* to Act 34, the General Assembly should have used different precinct population data to reflect those changes.[5]

Plaintiffs do not suggest, as defendants imply, *see* Presiding Officers' Mem. in Supp't of Mot. to Offer Evidence at 6, that the General Assembly should have used any *census* data other than those from the official 2000 Census. To the contrary, the 2000 Census necessarily provides the building blocks for the precinct populations in Pennsylvania. But the application of those census blocks to

[5] This is an exceedingly easy calculation, as demonstrated both by the declaration of Mr. Robert Priest and by the defendants' concessions that over 40 people were affected by the Armstrong County Court's decision. *See* Presiding Officers' Status Report at 3 n.1; Executive Officers' Status Report at 3; Executive Officers' Second Status Report at 4.

Pennsylvania voting precincts must track the correct precinct boundaries. When the Armstrong County Court altered the boundaries of the election precincts in South Buffalo Township, moving four census blocks from one precinct to the other, it changed the population in each precinct. In attempting to reduce population deviations in Act 34, the General Assembly was obliged to use the 2000 Census-based populations of the precincts *as they existed at the time.*

There is no support, moreover, for defendants' contention that Act 34 incorporates the existing precinct definitions only if the General Assembly had "constructive notice" of the Armstrong County Court's decision. *See* Presiding Officers' Mem. in Supp't of Mot. to Offer Evidence at 10-11. As all legislatures, the General Assembly is presumed to understand the legal definitions of terms used in statutes, especially when those terms are the geographic boundaries of state election precincts. *See, e.g., South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 351 (1998) ("'We assume that Congress is aware of existing law when it passes legislation.'" (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990))); *Rodriguez v. United States*, 480 U.S. 522, 525 (1987) (per curiam) (holding that Congress is presumed to act with full awareness of existing judicial interpretations); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."); *Schnall v. Amboy Nat'l Bank,* 279 F.3d 205, 218 (3d Cir. 2002) (courts presume that legislature, when passing laws, is aware of existing judicial interpretations); *Dresser Industries v. Underwriters at Lloyd's of London*, 106 F.3d 494, 498 (3d Cir. 1997) (same).

It is irrelevant to this Court's constitutional review of Act 34 whether the legislature intended to draw a different congressional map or whether it used outdated precinct definitions and precinct population data. The General Assembly must be held to the unambiguous language of Act 34, not what the defendants "wish[] it could be." *Barshak*, 106 F.3d at 506.

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

Defendants reiterate their claim 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. As plaintiffs have previously explained, this is a red herring that ignores the chronology of events in this case.

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' constitutional authority to draw congressional district boundaries. As noted above, the General Assembly easily could have exercised that authority by enacting a map that used something other than the then-existing precinct definitions. That it chose not to do so hardly deprives the legislature of its constitutional redistricting power.

Unable to reverse the chronology of events surrounding passage of Act 34, defendants imply that the Armstrong County Court's order was unconstitutional with respect to Act 1 because it moved congressional districts established in that earlier statute. But whether Act 1 incorporated precinct changes effectuated *after* its enactment has no bearing on the constitutionality of Act 34, a statute that was

preceded by the Armstrong County Court order. Whatever the status of the Armstrong County Court order with respect to Act 1,[6] it necessarily did not intrude on the General Assembly's authority in passing Act 34 after the fact.

II. THE POPULATION DEVIATIONS IN ACT 34 CANNOT BE LEGALLY JUSTIFIED.

Faced with a population deviation over four times larger than that previously invalidated by this Court, the defendants attempt to justify Act 34's deviations with arguments that either this Court has already rejected or that completely contradict defendants' prior assertions about the General Assembly's intent. The Court accordingly should declare Act 34 unconstitutional.

A. This Court Has Previously Held That A Population Deviation Negates the General Assembly's Claimed "Good Faith."

Defendants attempt to relitigate the issue of "good faith" under the governing one-person, one-vote standards set forth in *Karcher v. Daggett*, 462 U.S. 725, 734 (1983), arguing that the General Assembly at least *tried* to enact a zero deviation map. *See* Presiding Officers' Mem. in Supp't of Mot. to Offer Evidence at 10-11; Schweiker Defs' Joinder in Presiding Officers' Mot. to Offer Evidence at 9-10. However, as previously briefed and litigated by the parties, and as conclusively decided by this Court, the "good faith" defense is negated here simply by the fact that the population deviations were avoidable. *See Vieth v. Pennsylvania*, 195 F.Supp. 2d 672, 676 (M.D. Pa. 2002) ("[W]e hold that the

[6] Even if the Armstrong County Court order had been timely challenged as to Act 1's congressional districts and if a court had ruled the precinct moves were impermissible under Article I, Section 4, that Order and the precinct moves would have remained in effect for Pennsylvania's state legislative districts Thus, the Armstrong County Order and precinct moves would have been in effect at the enactment of Act 34.

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."). The defendants' "good faith" argument, moreover, has no obvious limitations; it could excuse voting deviations of thousands of persons or even more. The near-zero tolerance in voting rights cases reflects the importance of the rights at issue and the need to establish a clear, unmovable target for state legislatures. *See, e.g.*, *Karcher*, 462 U.S. at 731-38 (rejecting *de minimis* exception to one-person, one-vote rule).

Finally, although their previous filings in this Court disclaimed any desire to challenge the Armstrong County Court's order on state law grounds, Presiding Officers now argue, "[m]ost importantly, there was a statutory prohibition on boundary alterations in place at the time Act 34 was being considered and passed." Presiding Officers' Mem. in Supp't of Mot. to Offer Evidence at 11. This issue was conclusively decided by the Armstrong County Court, which squarely rejected defendants' argument. As plaintiffs have explained, this Court cannot second-guess a final decision of a state court, particularly on state-law issues, nor authorize defendants to ignore that decision. *See* Plaintiffs' Response to Defendants' Second Status Report at 3 & n.1.

B. Defendants' New Justification Is Flatly Inconsistent With Defendants' Other Arguments and Contradicts the Undisputed Evidence Already Before This Court.

Defendants make a last-ditch attempt to salvage Act 34, arguing that the General Assembly included the population deviations in Act 34 to place an industrial park entirely within the 12th congressional district, represented by

Congressman Murtha. That is an absurd argument that flies in the face of defendants' previous claims that the General Assembly both was unaware of the precinct shift and intended to pass a zero deviation map.

According to the defendants (and some of the additional evidence they wish to introduce at oral argument), "[t]he Armstrong County proceeding was purely a local matter. . . .The General Assembly was not involved; the Secretary was not involved." Presiding Officers' Mem. in Supp't of Mot. to Offer Evidence at 11. The General Assembly, the defendants contend in the first half of their briefs, believed it was enacting a zero deviation map that used precinct definitions as they existed prior to the Armstrong County Court's Order -- that is, before the industrial park was contained entirely within one of South Buffalo Township's two election precincts. *See* Presiding Officers' Mem. in Supp't of Mot. to Offer Evidence at 1-9; Schweiker Defs' Joinder in Presiding Officers' Mot. to Offer Evidence at 1-9. Surely, if defendants' claims and proposed evidence (including, *e.g.*, the legislative history of Act 34, the affidavit of the Executive Director of LDP, and the Armstrong County docket) were credited, that would conclusively defeat defendants' purported justification (although it would not, as argued above, alter the plain language of Act 34).

Equally fatal to the defendants' eleventh-hour justification[7] are the simple, undisputed facts already before this Court. To survive a one-person, one-vote

[7] Notably, this is the first time defendants have asserted this justification for Act 34's population deviation. In their previous filings, defendants argued only that the deviations in Act 34 were justified as a means of avoiding precinct splits, *see* Presiding Officers' Second Status Report at 8, an argument they wisely have abandoned in their latest filings.

challenge, defendants must prove that a map's population deviation "was '*necessary* to achieve some legitimate goal.'" *Vieth*, 195 F.Supp. 2d at 677 (quoting *Karcher*, 462 U.S. at 731) (emphasis added). Defendants cannot possibly demonstrate that a population deviation was necessary to avoid splitting the Northpointe industrial park into two congressional districts.

As this 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 "Alternate 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 Alternate Plan 4, *all* of Armstrong County, including Northpointe, was placed in Congressman Murtha's 12th district, *see* Plaintiffs' Trial Exh. 13).

CONCLUSION

For the foregoing reasons, the Court should decline to consider defendants' irrelevant proffered evidence, and should declare Act 34 unconstitutional.

Respectfully submitted,

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Dated: October 17, 2002

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

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

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 October 17, 2002, as follows:

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