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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 Rambo, Judge Yohn, Judge Nygaard

PLAINTIFFS' TRIAL BRIEF

The law governing a one-person, one-vote claim under *Karcher v. Daggett*, 462 U.S. 725 (1983), is straightforward. The inquiry under *Karcher* requires two steps: 1) Plaintiffs must show that Act 1 contains avoidable deviations from equal population, and if Plaintiffs satisfy that burden, 2) Defendants can save Act 1 only if they prove that such deviations were necessary in order to adhere to some specific, legitimate, nondiscriminatory and consistently applied districting criterion. As Plaintiffs' alternative plans demonstrate, lower population deviations were possible. Because we believe Defendants will be unable to offer any acceptable justification for Act 1's deviations (they have to date provided no justification through the state court proceedings in the *Erfer* case or in the

deposition testimony of their expert witnesses), the map must be struck down.

Once Act 1 is struck down, the issue then is one of remedy and the steps that this Court should take to ensure that the 2002 elections are conducted under a constitutionally sound plan. Given that the primary season is fast progressing, and given the ample evidence to indicate that the General Assembly will be unable to enact a new, constitutional districting plan in time, the Court has little choice but to order into effect new districts. In doing so, it should follow the *Karcher* model and impose a plan that reflects traditional, nonpartisan districting criteria.

I. ACT 1 MUST BE STRUCK DOWN IF PLAINTIFFS PRESENT AN ALTERNATIVE PLAN WITH LOWER DEVIATIONS AND DEFENDANTS ARE UNABLE TO PROVIDE A LEGITIMATE, NON-PARTISAN JUSTIFICATION FOR ACT 1.

Defendants have urged this Court to adopt a novel interpretation of *Karcher* that is contrary to the Supreme Court's opinion in that case, contravenes this Court's own rulings, and flies in the face of established redistricting case law. *See* Presiding Officers' Memorandum in Opposition to Motion to Divide March 11-12 Hearing. Defendants take such pains to manipulate the law because, absent a change in the Supreme Court's interpretation of Article I, Section 2, Act 1 must be struck down. As the evidence at trial will show, Plaintiffs can meet their burden to demonstrate that lower deviations are possible, and Defendants cannot justify Act 1's deviation from population equality on any legitimate ground.

A. The First *Karcher* Prong Requires that Plaintiffs Show Only that a Map with Lower Population Deviations Was Possible.

Karcher's two steps are well-established: first, plaintiffs must show that "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population," and if plaintiffs do so, defendants must "prov[e] that each significant variance between districts was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 730-31. As *Karcher* makes clear and as this Court recognized in its partial denial of Defendants' Motion to Dismiss, there is no such thing as a population variation that is too small to be of constitutional significance in the context of congressional redistricting – Defendants must justify *any* and *every* deviation once plaintiffs have met their burden. *Karcher*, 462 U.S. at 734 ("there are no *de minimis* population variations, which could practicably be avoided, but which nonetheless meet the standard of Art. I, Sect. 2, without justification.").

At trial, Plaintiffs will present two alternative plans, each of which has population deviations lower than Act 1. Alternative Plan #4 has the minimum possible population deviation – its districts differ in population by only one person.[1] Alternative Plan #4 achieves this minimal population

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[1] Because the total population of the Commonwealth of Pennsylavania does not divide evenly into 19 (the number of congressional districts), it is not possible to have a plan with a population deviation of zero. In addition to Alternative Plan #4, Plaintiffs will present Alternative Plan #3, which has a population deviation of 17, but splits only 20 municipalities (1/3 that of Act 1). This Court upheld small population deviations in the 1992 congressional redistricting plan because it advanced "an important public policy in Pennsylvania" -- preserving municipal boundaries. *See Nerch v. Mitchell*, No. 3:CV-92-0095, at 36 (M.D. Pa. August 13, 1992) (attached to Plaintiffs' motion to divide trial).

deviation without splitting any election precincts across the entire state; it also splits fewer municipalities than Act 1, is more compact, and does not unnecessarily pair any incumbents.

As this Court recognized in the 1992 congressional redistricting case, by proffering Alternative Plan #4 to the Court, Plaintiffs have met their burden under *Karcher*. "Clearly, then, once a plaintiff comes forward with credible evidence that the overall deviations in the plan proffered by the state could be reduced, the burden shifts to the state to justify the deviations in its plan by reference to legitimate state interests." *Nerch v. Mitchell*, No. 3:CV-92-0095, at 27 (M.D. Pa. Aug. 13, 1992). This Court recognized the overwhelming precedent under which the presentation of alternate maps with lower deviations – such as those that Plaintiffs proffer here – were sufficient to shift the burden. "The plaintiffs introduced several plans with lower population deviations than those contained in the Pennsylvania Supreme Court plan. Courts have widely concluded that this type of evidence is sufficient to shift the burden to the defendants to justify the deviations." *Id.* at 31.

Other courts have indeed found that evidence sufficient. *See, e.g.*, *Stone v. Hechler*, 782 F. Supp. 1116, 1125 (N.D. W. Va. 1992) ("*Karcher* teaches that *if any plan* (other than the one under judicial attack) *would reduce or eliminate population differences* among the congressional districts, the plaintiff has met its burden under the first prong of *Karcher*.") (emphasis added); *Anne Arundel County Republican Cent. Comm. v. State*

Admin. Bd. of Election Laws, 781 F. Supp. 394, 395 (D. Md. 1991) ("Given the existence of H.B. 22, a plan with a smaller numerical deviation from absolute equality, plaintiffs have proved that H.B. 10's deviations did not result from an unavoidable good faith effort to achieve population equality.").

Defendants urge upon the Court an interpretation that neither recognizes *Karcher*'s distinct prongs nor adheres to common sense. Relying on *Stone v. Hechler*, they argue that in order to satisfy *Karcher*'s first prong, Plaintiffs must show that a plan with lower deviations was introduced *in the legislature*. This argument fails for a number of reasons, not the least of which is that it misreads *Stone* itself. *Stone* ruled only that Plaintiffs had satisfied their burden by showing that seventeen plans with lower deviations were introduced in the legislature. *See id.* at 1126. Nowhere does *Stone* say that the lower deviation plans must have been introduced in the Legislature; it says only says that the existence of such plans is, not surprisingly, sufficient for plaintiffs to meet their burden.

Second, such a requirement would force courts to uphold *any* population deviation, no matter how large, as long as no other plan with lower deviations was introduced. This clearly violates *Reynolds v. Sims*, 377 U.S. 533 (1964). If Defendants were correct, Act 1 would not have to be constitutional; it would only have to be "less" unconstitutional than other plans that happened to be before the legislature. But the Supreme Court has made clear that "the political realities of 'legislative interplay'" can never be

used to justify a population deviation (or indeed any constitutional violation). *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969); *id.* at 533 ("Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.").

Defendants' attempts to obscure *Karcher*'s plain meaning and its straightforward two-prong test is, at best, nothing more than an effort to re-introduce the *de minimis* standard that the Supreme Court and this Court have so clearly rejected. *Karcher* is clear: if lower deviations are possible, then the Defendants – not the Plaintiffs – must justify the inequality.

B. The Second Prong of *Karcher* Requires Defendants to Identify a Specific, Nondiscriminatory, Legitimate and Consistently Applied Principle that Necessitated the Deviations.

Once Plaintiffs have shown that it was possible to create a map with lower population deviations, the burden shifts to the Defendants to prove that the population deviations in its plan were "necessary to achieve some legitimate state objective." *Karcher*, 462 U.S. at 740; *accord Nerch v. Mitchell*, No. 3:CV-92-0095, at 27 (M.D. Pa. 1992). Such legitimate state objectives, if "consistently applied" and "nondiscriminatory," include "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 Supreme Court has noted, "[a]s long as the criteria are nondiscriminatory, these are all

legitimate objectives that on a proper showing could justify minor population deviations." *Id.*

Defendants at trial will not be able to meet their burden because Act 1 does not consistently advance any of the legitimate objectives recognized in *Karcher*. Rather than making districts compact, it creates noncompact, bizarrely shaped districts. Rather than respecting municipal boundaries, Act 1 splits 84 local governments, including 25 counties and 65 cities, boroughs, and townships. Rather than preserving existing districts and maintaining relationships between constituents and their current representatives, it fundamentally alters the character of districts with Democratic incumbents, snaking through communities and dividing up towns and people with common interests. And rather than avoiding contests between incumbent Representatives, Act 1 deliberately pits six incumbents against each other – two more than is necessary – in a manner which, notably, favors Republicans in every case.

In short, Act 1 reflects no legitimate, nondiscriminatory redistricting policy objectives. As the evidence will show, the only possible rationale behind Act 1 and the only explanation behind the map's population variances is the goal of minimizing the election of Democratic Congressional candidates and maximizing the election of Republicans. That discriminatory objective is wholly illegitimate and one to which federal law permits no deference. Defendants drew the boundaries of the new congressional districts to reflect geographical concentrations of Republican

and Democratic voters, with the intention of fragmenting Democratic voting strength and consolidating Republican voting strength. Act 1 was drawn to ensure that Democrats, who constitute a slight majority of Pennsylvania voters, would win no more than five or six of 19 congressional seats.

To accept the population variances that have resulted from Defendants' efforts to achieve this degree of partisan bias would be antithetical to the constitutional command that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). If the Court were to accept naked partisanship as a legitimate basis on which to justify an otherwise unconstitutional population deviation, it would be making new law. Since *Karcher* was decided, no court has treated a similar effort to secure partisan advantage as a "legitimate" and "nondiscriminatory" justification for violation of the Constitution's one-person, one-vote mandate.

Indeed, the Supreme Court's decisions in the *Karcher* litigation make clear that an attempt to gain partisan advantage can never justify a population deviation. The District Court charged with drafting a remedy on remand in *Karcher* rejected the state's plan on the grounds that where the state "deviate[d] from the norm of population equality for the patently discernable purpose of partisan advantage," that policy deserved no deference. *Daggett v. Karcher*, 580 F. Supp. 1259, 1263 (D.N.J.), *aff'd*, 467 U.S. 1222 (1984). To be sure, *Karcher* does not forbid consideration of

politics altogether. The goals of avoiding contests between incumbents might, in some circumstances, justify population deviations. But *Karcher* does not permit population deviations that result solely from the discriminatory motive of sending as few Democrats as possible to Congress. The Constitution forbids a state from intentionally disadvantaging a group on the basis of its partisan affiliation or political beliefs. *See, e.g., O=Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 717 (1996); *Elrod v. Burns*, 427 U.S. 347, 372-73 (1976). It follows that Defendants' efforts to minimize the voting power of Pennsylvania's Democratic voters simply cannot excuse their violation the Constitution's one-person, one-vote mandate.

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

Upon finding a congressional districting plan illegal, a Federal Court must turn to fashioning an appropriate remedy. Given the current stage of Pennsylvania's congressional electoral process, the only way to guarantee that the 2002 elections proceed under a legal plan is for the Court to order into effect a remedial map of its own. The remedial map should reflect traditional nonpartisan districting principles, such as those described in *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

A. The Court Should Create Remedial Districts.

A federal court's equitable power to remedy constitutional violations is broad and is to be exercised upon declaring a plan unconstitutional. As

the Supreme Court made clear in *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), "once 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." Accordingly, the Court should enjoin all Defendants from conducting any election under the illegal districts.

Further, the overwhelming interest in ensuring that federal elections proceed on schedule requires that, when time before an election is short, a Court must impose a plan itself. *See, e.g., Connor v. Finch*, 431 U.S. 407, 422-25 (1977) (noting that "elections are on the horizon," and because a plan is not in place the District Court would have to draw one). Moreover, it is also clear that federal courts have authority to move filing deadlines when necessary to consider and address constitutional claims. *See Upham v. Seamon*, 456 U.S. 37, 44 (1982) (finding that redistricting plan was unconstitutional, and leaving it to district court to consider "the legal and practical factors that may bear" on rescheduling election deadlines); *see also Vera v. Bush*, 933 F. Supp. 1341, 1342 (S.D. Tex. 1996) (finding that legislature would not adopt new plan in time and so imposing plan and setting election calendar itself).

Given the time and the progress of the election season, it is imperative that the Court put a plan in place for the 2002 election. On March 13, candidates who did not circulate nomination petitions may begin circulating nomination papers. On March 20, the Commonwealth will finalize the

positions of candidates on the primary ballots. March 27 is the final day for candidates to withdrawal, and by April 9 candidates will have filed their first campaign finance reports. Meanwhile, the Department of State and Commissioner of Elections will be preparing to conduct the primary election itself. It is possible for the Court to adjust these dates, as was done a decade ago, in order to ensure an orderly election process without moving the date of the primary date of May 21.[2]

There is virtually no likelihood that the General Assembly would be able to create a new plan in time to allow the normal electoral processes leading up to the May 21 primary. Redistricting is an inherently difficult process for legislatures to undertake, and the process that the General Assembly undertook to produce Act 1 reveals that it is ill-prepared to act as swiftly as would be required here. The Legislature had an entire session to act, but was unable to do so throughout 2001. Senate Bill 1200 was originally introduced in the Senate on November 16, 2001. Yet despite constant attention and passage of competing redistricting bills by each

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[2] Although the Court has the power to change the date of the primary election altogether, Plaintiffs do not believe this will be necessary. Moving the entire May 21 primary would affect the races for Governor, Lieutenant Governor, Senator in the General Assembly, Representative in the General Assembly, and Member of the Commonwealth's political committees, as well as the numerous local races that are scheduled to be decided on that day. By the same token, moving only the congressional primary would force the Commonwealth to run two primaries, which would be costly and would likely affect the composition of the electorate by depressing voter turnout. Thus, although any action that the Court takes at this point will likely require some alteration in the election calendar, remedies that risk changing the primary date, while far preferable than allowing the election to proceed under an unconstitutional plan, should be considered only as a last resort.

chamber, the Assembly was unable to agree on a compromise and was forced to adjourn in mid-December with little hope of passing legislation. Only a special session for the express purpose of addressing the redistricting issue led to passage of a final bill on January 3, 2002 – more than six weeks after the bill was first introduced.

The length of the process this year was not unusual. In the 1990s round of redistricting, the General Assembly was unable to meet a court-imposed deadline for action. On January 30, 1992, the Commonwealth Court announced that it would allow the Legislature until February 11, 1992 to pass a plan before the court would act. The General Assembly failed to act within that time period, and the state courts were forced to draw new districts themselves. *See Mellow v. Mitchell*, 607 A.2d 204, 205 (Pa. 1992). The delay for the Legislature was ultimately fruitless, and forced the courts to alter the election calendar more than would have otherwise been necessary. *See id.* at 224-25. There is no reason to add additional delay and further disrupt the electoral calendar.

B. *Karcher* Requires the Court to Use Traditional, Nonpartisan Districting Principles in Drafting a Plan.

The Court should draft a remedial plan that conforms to legal requirements and traditional nonpartisan districting principles. It should not, however, defer to any aspect of Act 1 if the Court ultimately determines that its population deviation was not based on any legitimate justification. To be sure, Federal Courts that draw remedial plans are to respect a State's

legitimate districting policy objectives. However, as the March 11-12 trial will demonstrate, *Act 1 reflects no legitimate districting policy objectives.* The only possible explanation for the map's splitting of municipal boundaries and pairing of longtime incumbents is a discriminatory policy to which Federal law permits no deference: the favoring of one political party and the dismantling of another. This is a far cry from the political gain that is traditionally permitted as a by-product of other, legitimate preferences such as the preservation of incumbents. Deference to Act 1 would be nothing more than judicial adoption of purely partisan redistricting criteria; while state legislatures may have some latitude in using politics in redistricting, federal courts do not.

As the Supreme Court made clear in the *Karcher* litigation, the only proper remedy for a one-person, one-vote violation in these circumstances is the creation of new districts that respect traditional nonpartisan districting principles. In the first *Karcher* decision, the Supreme Court struck down a congressional districting plan that lacked legitimate justifications for its population deviations. *See Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (*Karcher I*). The case then returned to the District Court for remedial proceedings. In describing how it would evaluate the proposed remedial plans before it, the District Court recognized that the Supreme Court's decision in *Karcher* :

> provides useful instructions to district courts faced, as we are, with selecting a districting plan because of a failure in the legislative process. We may take

> into account at least those factors which the Court has recognized as legitimate, namely: making districts compact, preserving municipal boundaries, preserving cores of prior districts, avoiding contests between incumbents, and inhibiting gerrymandering.

Daggett v. Karcher, 580 F. Supp. 1259, 1261-62 (D.N.J. 1984), *aff'd*, 467 U.S. 1222 (1984).

In evaluating the proposed remedies, the District Court in *Karcher* *specifically rejected* the plan that achieved lower population deviation but otherwise most resembled the plan just struck down. In rejecting the Senate Plan, which had been passed by the Legislature but vetoed by the Governor, the District Court noted that it most resembled the "Feldman Plan" that had just been struck down, and that it had avoided contests between incumbents. "The most glaring defects in the Feldman Plan, however, are carried forward in [the Senate Plan]. These are an obvious absence of compactness, and an intentional gerrymander in favor of certain Democratic Representatives." *Id.* at 1262.

In so ruling, the District Court explicitly rejected an argument based on *White v. Weiser*, 412 U.S. 783 (1973), under which a district court would be bound to adopt whatever remedial plan most closely resembles the plan selected by the State legislature. *See id.* at 1262-63. The District Court distinguished *White* on the precise grounds that are present here: in *White* the District Court committed reversible error by rejecting without explanation a State's *legitimate* interest in protecting incumbents, whereas *Karcher* involved a plan that, although not struck down as an

unconstitutional partisan gerrymander, reflected an *illegitimate* interest in pairing certain incumbents of one party. "The State policy embodied in the Feldman Plan was to deviate from the norm of population equality for the patently discernible purpose of partisan advantage." *Id.* at 1263. That policy, the District Court concluded, deserved no deference. *See id.* Instead, the District Court adopted a proposed plan that achieved the lowest population deviation, had compact districts, and avoided pairing incumbents. *Id.* at 1264-65.

The Supreme Court agreed with the District Court's judgment, both rejecting an application for a stay, *Karcher v. Daggett*, 466 U.S. 910 (1984) (*Karcher II*), and affirming the District Court's decision and order, *Karcher v. Daggett*, 467 U.S. 1222 (1984) (*Karcher III*). Justice Stevens's concurring opinion in *Karcher II* most clearly lays out the Supreme Court's reasoning.[3] Distinguishing *White v. Weiser*, 412 U.S. 783 (1973), on the grounds that *White* had involved a District Court that had rejected legitimate state interests with no explanation, Justice Stevens reasoned that when "there

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[3] The summary affirmances in *Karcher II* and *Karcher III* carry full precedential weight. A summary affirmance at the very minimum "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 177 (1977). Because the facts in the present case mirror the facts in *Karcher*, the decisions there govern this case. Further, the precendential value of a summary action "is to be assessed in the light of all the facts" in a particular case, *id.* at 177. The facts surrounding the *Karcher* litigation could not more strongly demonstrate that they control this case. First, *Karcher II* was affirmed with a full concurring opinion from Justice Stevens and over the vigorous dissent of Justices Brennan, White and Marshall, suggesting that the majority was fully aware of what it was doing. Second, the second and third *Karcher* decisions followed the fully briefed and argued *Karcher I* decision, so the Court understood the complete history of and issues pertaining to the case.

is no state policy to which the District Court should have deferred that justifies the bizarre district lines in the original reapportionment plan," a District Court has "broad discretion" to fashion an appropriate remedy. *Karcher II*, 466 U.S. at 910-11 (Stevens, J., concurring). Because the District Court had chosen a plan that, compared to the rejected Feldman plan, lowered population variations, created more compact districts, and was not an "intentional gerrymander in favor of certain Democratic representatives," the District Court was well within the bounds of its discretion. *Id. See also In re Pennsylvania Congressional Dists. Reapportionment Cases*, 567 F. Supp. 1507, 1512-13 (M.D. Pa. 1982) (noting, even before *Karcher*, that central to *White*'s holding was that the state plan had reflected legitimate interests); *Carstens v. Lamm*, 543 F. Supp. 68, 78-83 (D. Col. 1982) (distinguishing *White*, even before *Karcher*, and rejecting state's proposed plan in favor of plan that better reflected traditional districting criteria).

Thus, in following *Karcher* and providing constitutional congressional districts for Pennsylvania voters, the Court should adopt a plan that minimizes population deviations and respects traditional districting criteria. Either of the plans presented by Plaintiffs during the trial satisfies those principles better than a modified version of Act 1. The Defendants' intentional attempt to gain the maximum possible partisan advantage sacrifices all legitimate redistricting criteria. Act 1's extreme bias and its

lack of any other justification preclude it from serving as the basis for any remedy imposed by a Federal Court.

CONCLUSION

For the foregoing reasons, this Court should immediately declare Act 1 unconstitutional and enjoin future elections under it, and order into effect congressional districts that conform to constitutional requirements and respect traditional nonpartisan redistricting principles.

Respectfully submitted,

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Dated: March 11, 2002

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

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2002, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record by hand delivery:

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